1174

Office Supreme Court U.
FILED
JAN 12 1904
JAMES H. McKENNEY,
Clerk

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1903.

No. 132.

THE PEOPLE'S GAS LIGHT AND COKE COMPANY,
Appellant,

vs.

THE CITY OF CHICAGO.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

BRIEF ON BEHALF OF APPELLANT.

WILLIAM D. GUTHRIE,
JAMES F. MEAGHER,
WILLIAM F. SHEEHAN,
Of counsel for appellant.

Washington, January 8, 1904.

[18,672.]

[18,672.]

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM 1902.

No. 132.

THE PEOPLE'S GAS LIGHT AND COKE COMPANY,
Appellant,

vs.

THE CITY OF CHICAGO.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

BRIEF ON BEHALF OF APPELLANT.

This appeal presents for review a final decree of the Circuit Court of the United States for the Northern District of Illinois, dismissing the complaint of the appellant, The People's Gas Light and Coke Company. A direct appeal was taken to this court under section 5 of the Judiciary Act of 1891 (26 Stat. 826, 827), on the ground that the case was one in which a law of a state (*i. e.*, a municipal ordinance) was claimed to be in contravention of the Constitution of the United States in that such ordinance impaired the obligation of a contract contained in the amended charter of the appellant. The cause was heard and decided by the court below upon a general demurrer (record, p. 84) to the amended bill of complaint filed by the appellant, The People's Gas Light and Coke Company, against The City of Chicago (pp. 26–83), and final judgment was entered sustaining the demurrer and dismissing the bill "for want of jurisdiction" (p. 37). Subsequently, the decree was amended so as to strike therefrom the words "for want of jurisdiction," which had been employed through inadvert-

ence, and in lieu thereof the decree was made to read that the bill was dismissed "upon the merits as to the alleged contract rights of the complainant, but without prejudice to any other suit in respect to the question of power of the city council under the laws of the state of Illinois."[1]

Although the amended bill of complaint is somewhat lengthy, under the practice recently in vogue in many circuits, what are conceived to be the ultimate essential facts are not complicated, and will be expressed in as brief and succinct terms as practicable.

The amended bill of complaint sets forth that The People's Gas Light and Coke Company, hereinafter called the People's Company, was originally incorporated by an act of the legislature of Illinois, approved February 12, 1855 (Laws of Illinois, 1855, p. 614, pamphlet of statutes, etc., p. 1), which created certain individuals and their associates a body corporate with perpetual succession and full power to acquire, hold, occupy and enjoy all such real and personal estate as might be necessary and proper for the construction, extension and usefulness of its works. The company was granted authority to proceed to the erection of the necessary works for the manufacture of gas and coke within the city of Chicago and to manufacture and sell gas for the purpose of lighting the said city or its streets and any buildings, etc., therein, and to erect all necessary works and apparatus; and it was further given power on and after February 12, 1859, or sooner, by and with the consent of the

[1] See addition to record under order of this court December 9, 1903, p. 3.

Chicago Gas Light and Coke Company, to lay pipes for the purpose of conducting the gas in any of the streets or avenues of said city, with the consent of the city council. It was also provided in section 4 of the statute that the company should furnish and supply to the city of Chicago for its public use, at the election of the proper city authorities, a sufficient supply of gas at a rate not exceeding two dollars per thousand feet and should also supply gas to the inhabitants of said city at a rate not exceeding two dollars and fifty cents per thousand feet (record, pp. 26, 27). The reference to the Chicago Gas Light and Coke Company was occasioned by the fact that in February, 1849, that company had been chartered by the Illinois legislature, and had been granted the exclusive privilege of supplying the city of Chicago and its inhabitants with gas for the period of ten years.[1] The common council of the city of Chicago, under date of August 30, 1858, passed an ordinance granting to the People's Company permission and authority to lay its gas mains, pipes, feeders and service pipes in *any* of the streets, avenues, highways, public parks or squares *throughout* said city "subject at all times, however, to the resolutions and ordinances of the common council of said city." It was further provided that nothing in the ordinance should be construed to conflict with the rights and privileges of the said Chicago Gas Light and Coke Company if pipes were laid before February 12, 1859 (record, p. 29, pamphlet, p. 3). Thereafter, in 1865, the charter of the People's Company was amended in three particulars, namely, (1) by increasing the powers of the company, (2) by eliminating all

[1] Sec. 3, Act of February 22, 1849, record, pp. 34, 35.

reference to the Chicago Gas Light and Coke Company, its exclusive privilege having in the meantime expired, and (3) by repealing section 4 of the act of 1855 and substituting the provision quoted below. As the merits of the present controversy depend in great measure upon the legal import and effect of the wording of these amendatory provisions, they may properly be quoted *in hæc verba* as follows (record, pp. 27, 28):

> SECTION 1. "That the second section of said act be and the same is hereby so amended as to read as follows, viz: The corporation hereby created shall have full power and authority forthwith to proceed to the erection and maintenance of the necessary works for the manufacture of gas and coke within said city of Chicago, and to manufacture, supply and sell gas, to be made from any and all substances, or a combination thereof, from which inflammable gas is usually obtained, and to be used for the purpose of lighting the city of Chicago, any streets, buildings, manufactories, public places or houses, therein contained, and to erect and use all necessary works and apparatus for such purposes aforesaid, and with the consent of the common council of said city, to lay down and use all necessary pipes for the conducting of gas in and along any of the streets, alleys, avenues or public squares of said city: *Provided*, that no permanent injury or damage shall be done to any such street, alley, avenue or public square by the laying down of any such pipes. . . .
>
> § 3 . . . and the fourth section of said act is hereby repealed; but ten years after the passage of this act the common council of the city of Chicago may, by resolution or ordinance, regulate the prices charged by said company for gas; but said common council of the city of Chicago, shall, in no case, be authorized to compel the said company to furnish gas at a less rate than three dollars per thousand feet."

At the time of the passage of the amendatory act of 1865, the price charged for gas by the People's Company to consumers in the city of Chicago was the gross rate of four dollars and twenty-five cents and the net rate of three dollars and seventy-five cents per thousand cubic feet, but such rate was thereafter from time to time voluntarily reduced, so that at the time of the passage of the so-called Merger or Consolidation Act mentioned below, the price charged for illuminating gas was the net rate of one dollar per thousand cubic feet, which has ever since been maintained (record, pp. 31–33).

The People's Company duly accepted the said charter, and, in acting upon the powers and privileges granted to it and carrying out and performing its duties and obligations, invested many millions of dollars of its capital and funds by erecting gas works, plants and appliances, and by laying down pipes, mains, feeders and appurtenances (record, p. 29). At the time of the filing of the bill of complaint, it owned real estate in the city of Chicago to the value of upwards of two million dollars and personal property to the value of upwards of ten million dollars, and it had many buildings, factories, retorts, plants and apparatus for the manufacture, sale and distribution of gas in all parts and divisions of the city, and it had upwards of seventeen hundred miles of pipes and mains laid in the streets, alleys, avenues, highways and public squares thereof, and it was then engaged in the operation of the plants and the distribution of gas through said pipes, etc., to the city of Chicago, and to the citizens as consumers of its gas (record, p. 31). The city was itself, and for many years

had been, a customer of the People's Company, and consumed gas to the amount of upwards of four hundred thousand dollars annually, and the company supplied over three hundred thousand private consumers (record, pp. 32, 79).

In 1897, the legislature of Illinois passed an act entitled "An act in relation to gas companies," approved June 5, 1897, and in force July 1, 1897.[1] For convenience of reference, the statute is printed at length in the pamphlet filed with this brief. The statute by its terms applied to all gas companies then or thereafter organized, and the purport of its material provisions, which bear in any way upon the issues now presented for adjudication, may be stated.

Section 1 of the act of 1897 authorized and empowered gas companies "to sell, transfer and convey or lease their real and personal property, rights, franchises and privileges in whole or in part to any other gas company doing business in the same city, town or village," and authorized such other company "to purchase or lease and to hold and enjoy said property." Section 2 authorized gas companies, "doing business in the same city, town or village, to consolidate and merge into a single corporation, *which shall be one of said merging and consolidating corporations.*" Section 3 has no reference to purchase or consolidation and merger, but granted to all gas companies the additional power "to manufacture and distribute gas for fuel purposes and to distribute natural gas," and provided that "all companies authorized to distribute gas in any city, town or village shall have the power to distribute the same

[1] Laws of Illinois, 1897, p. 177; pamphlet, p. 21.

in any territory annexed to such city, town or village." The remaining provisions of the act of 1897 relate to the manner and effect of the purchase, lease, or consolidation and merger authorized by sections 1 and 2, and they are important principally as emphasizing that no new gas company is contemplated, but on the contrary that, even in the case of consolidation and merger, there is preserved the distinct identity of the company "into which any company or companies are consolidated and merged under this act." Thus, in section 8 it is provided, as the legal effect of the agreement or agreements of consolidation and merger, that the companies "shall thereupon be and are hereby declared to be consolidated and merged into *the one corporation* specified in such agreement or agreements," which section 2 had declared "shall be one of said merging and consolidating corporations." Section 9 provides that the purchasing or leasing company or the consolidated corporation shall be subject to and shall perform the legal obligations resting upon the companies respectively, and that "such performance by said corporation so purchasing or leasing, or by such consolidated corporation, shall be held and considered as the performance by each of the respective companies so selling, leasing or consolidating, of the legal obligations theretofore resting upon each of them respectively." The companies are, however, to be regarded as still subsisting for the protection of their respective creditors or mortgagees, "the *separate* exercise of their respective powers, and the *separate* enjoyment of their separate privileges and immunities being suspended until the protection of such creditors or mortgagees shall require their resumption,

when such suspension shall cease, so far as, and for such time as, the protection of such creditors or mortgagees may require." Section 11 reads as follows:[1]

> "SEC. 11. Any corporation purchasing or leasing the property of any company or companies, or into which any company or companies are consolidated and merged under this act, shall be, at the time of availing itself of or accepting the benefits of this act, in the actual business of furnishing gas to consumers; and shall be subject to the following provisions:
>
> Such corporation shall not increase the price charged by it for gas of the quality furnished to consumers during any part of the year immediately preceding such purchase or lease or such consolidation and merger.
>
> Such corporation shall furnish gas to consumers as good in quality as it furnished previous to such purchase or lease or such consolidation and merger."

And section 12 provides severe penalties for the violation of any of the provisions of the foregoing section 11, including liability to proceedings in *quo warranto* with a judgment of ouster of the company's franchises, etc.

The bill further alleges that in August, 1897, pursuant to the power and authority thus granted to and conferred upon gas companies doing business in the same city, the Chicago Gas Light and Coke Company, the Consumers' Gas Company, the Equitable Gas Light and Fuel Company of Chicago, the Suburban Gas Company, the Lake Gas Company, the Illinois Light, Heat and Power Company, and the Chicago Economic Fuel Gas Company, for a valuable consideration, transferred to the People's Company, and the latter then and there acquired and took over all the gas mains, pipes, feeders, service

[1] Laws of Illinois, 1897, pp. 177, 180; pamphlet, p. 26.

pipes, connections and appurtenances and all the manufacturing plants, buildings, machinery and property of the said gas companies, and that subsequently, in January and November, 1898, the Mutual Fuel Gas Company, the Hyde Park Gas Company and the Calumet Gas Company similarly transferred to the People's Company and the latter thus acquired all the gas mains, pipes, feeders, service pipes, connections and appurtenances and all the manufacturing plants, buildings, machinery and property of the said three last named companies (record, p. 33). These ten gas companies whose properties were thus acquired were all companies organized in the state of Illinois and under its laws; their several properties so acquired were all situated in the same city, *i. e.*, Chicago, and they were all doing business in that city (record, p. 33). At the time of the acquisition of the properties of the other gas companies, the People's Company distributed the gas then manufactured by it chiefly in the west division of the city of Chicago, although its pipes and mains also extended into the south division of the city (record, p. 34), and the price charged by it for gas of the quality furnished to consumers during any part of the year preceding such acquisition of the plant of the other company was one dollar per thousand feet (record, p. 64). The other companies were furnishing gas in various divisions of the city and in annexed territory formerly comprised within certain towns or villages (record, p. 33). Upon such transfer to the People's Company, however, the various companies named ceased to manufacture and supply gas, and thereafter gas was supplied and furnished by the

People's Company to customers of the other companies (record, pp. 34, 65). The amended bill of complaint sets forth at length the history of the various companies whose properties were acquired by the People's Company and the various municipal ordinances under which they had secured the consent of the proper authorities of the city, town or village, as the case might be, to the laying of pipes or the erection of gas works (record, pp. 34, 36, 40, 44, 47, 49, 56, 58, 62). These ordinances in every instance, except the case of the ordinance of Hyde Park to the Hyde Park Gas Company, contained among other terms a provision that the price of illuminating gas should not exceed fixed rates, varying from two dollars and fifty cents per thousand cubic feet in 1881 to one dollar and ten cents per thousand cubic feet in 1891. The ordinance from the village of Hyde Park, granted in 1889 to the predecessors of the Mutual Fuel Gas Company, provided that, whilst the rate to private consumers should not exceed one dollar and twenty-five cents per thousand cubic feet, the charge to the village of Hyde Park itself should not exceed ninety cents per thousand cubic feet. The act of 1897, however, provided in section 10 that "the purchase and sale or lease, or the consolidation and merger authorized by this act, shall not be held or construed as a violation of the provisions of any ordinance or bond given thereunder."[1]

The amended bill of complaint further alleges that at the time of the acquisition by it of the plants, pipes and mains of the other gas companies, as aforesaid, under the provisions of said act of 1897, the People's Company

[1] Laws of Illinois, 1897, p. 180; pamphlet, p. 25.

was in the actual business of furnishing gas to consumers, that during the year immediately preceding such acquisition the price charged by it for illuminating gas was one dollar per thousand cubic feet, that since such acquisition it has not increased the price charged by it for gas of the quality theretofore furnished to consumers during any part of said year, and that the gas so furnished by it to consumers has been better in quality and of higher candle-power than the gas theretofore sold by such other companies (record, pp. 64, 65).

The amended bill further alleges that since such acquisition of the properties of other gas companies, the People's Company itself has furnished gas to the consumers formerly supplied by such other companies, that it has extended, enlarged and improved the plants, mains and property so acquired, that in extending, enlarging, improving and completing its system it has always and in every case proceeded and acted by virtue of the franchise, power and authority contained in its own charter and by virtue of the consent of the city of Chicago aforesaid and not under any of the powers, franchises or privileges of any of such other gas companies, and that since August 5, 1897, in laying, maintaining, using, conducting and operating its plants, gas mains, pipes, feeders, etc., and in carrying on its business of manufacturing, distributing and selling gas to the city of Chicago and to the inhabitants thereof, it has acted solely and exclusively under and by virtue of the powers in its own charter and by and with the consent of the city of Chicago (record, pp. 55–66). It is then alleged that the city of Chicago had full knowledge of the ac-

quisition and taking over of the properties of such other gas companies and consented thereto and approved, ratified and confirmed the same (record, p. 66). In 1899 the city entered into a contract with the People's Company which recognized such acquisition and provided that the People's Company should continue to light the streets and public buildings and places of the city (record, pp. 66–68). Under and by virtue of this contract, the city collected from the People's Company a percentage of its gross receipts amounting to upwards of $300,000 (record, p. 72). It is also shown that the city council has repeatedly, beginning in May, 1898, directed the People's Company to lay gas mains, etc., in all divisions of the city and in districts which had originally been served by the gas companies whose properties were acquired by the People's Company, that such directions had been obeyed and followed at great expense, and that since August 5, 1897, the city had issued to the People's Company upwards of seventy-five thousand permits to make excavations in all divisions of the city for the purpose of laying gas mains, pipes, etc., and of repairing, renewing, enlarging and completing the same (record, p. 72). It further appears that the People's Company has taken up and removed many hundred miles of pipes so acquired from other gas companies, that since August 5, 1897, it has laid upwards of five hundred miles of gas mains and pipes, that its system of mains, etc., has been largely remodeled, relaid and improved, that it is practically impossible to determine what pipes, mains and feeders, if any such there be remaining, were acquired from said other gas companies, that it has been obliged to rebuild and has substantially

rebuilt at great expense all of the plants and has relaid and replaced all of the gas pipes and gas mains in the city of Chicago acquired from such other companies, and that all the mains, etc., so acquired are used to furnish and distribute gas manufactured by it under its own charter (record, p. 74).

The amended bill of complaint then avers that the city council of Chicago, on or about October 15, 1900, without investigation or judicial proceedings of any kind and without giving or permitting a hearing of any sort to the People's Company, passed an ordinance which, among other things, provided that no corporation manufacturing, selling, supplying or distributing gas in the city of Chicago for illuminating or for fuel purposes should charge, demand or collect from any consumer thereof more than seventy-five cents per one thousand cubic feet of gas consumed or used, and that the gas so manufactured should afford a light of not less than twenty candle-power, to be measured and ascertained at the place of consumption in said city by the most modern appliances known to science for measuring the candle-power of illuminating gas. Such ordinance, which is set forth at length in the amended bill of complaint, imposed penalties for the violation thereof of not less than twenty-five nor more than two hundred dollars for each and every offense (record, pp. 78, 79). The amended bill of complaint further contains specific allegations showing the dilemma of the People's Company, the inevitable multiplicity of suits with its three hundred thousand customers if the ordinance were enforced, and the insufficiency and inadequacy of any remedy at law for the protection of

the property interests involved, by reason, among others, of the financial irresponsibility of many of its customers (record, pp. 80–81).

Although the allegations of the amended bill of complaint do not definitely state whether the method of acquisition by the People's Company of the properties of other gas companies was by purchase under section 1 or by consolidation under section 2 of the act of 1897, nevertheless the contract between the city of Chicago and the People's Company, dated July 20, 1899, set forth at length in the amended bill of complaint, clearly declares that the acquisition was by way of consolidation and merger into the People's Company (record, p. 67). Such was conceded by the city in the court below (record, p. 22). It will, therefore, be assumed, as it was by the court below, that the agreements entered into between the contracting gas companies under the authority of the act of 1897 constituted a consolidation and merger as authorized by section 2, which is believed to be the undisputed fact.

The case was first heard on the original bill of complaint and upon the general demurrer filed by the defendant city of Chicago to such original bill, and it was at the suggestion of the learned court below that the bill was amended so as to bring in the histories of the constituent companies (record, p. 25). The learned court below in effect practically decided that the provision of the act of 1865 amending the charter of the People's Company and agreeing that the city council should not be authorized to compel it to furnish gas at a less rate than three dollars per thousand feet, did not protect the People's Company from the action of the city council

in respect of the property of other gas companies which it might have acquired under the act of 1897, and that as no divisional relief had been asked—that is to say, as the People's Company had not specifically asked for relief as to gas supplied by and through its own plant—the bill should be dismissed. The court refrained from passing upon the question of the power of the city council under the laws of Illinois, on the alleged ground that its jurisdiction did not extend to that question (record, pp. 23, 24).

Upon the subsequent filing of an amended bill of complaint, a general demurrer was again interposed and the court filed a supplemental opinion in which the demurrer was sustained, and the bill directed to be dismissed for want of jurisdiction in the court below over the cause of action set forth (record, pp. 86, 87). As stated above, the final decree originally entered dismissed the amended bill for want of jurisdiction, but this disposition was inadvertent. Subsequently by stipulation and order in the court below and by order of this court entered December 9, 1903, the record was corrected so that the opinion should direct the dismissal of the bill upon the merits as to the alleged contract rights of the People's Company, "but without prejudice to any other suits in respect of the question of power of the city council under the laws of the state of Illinois," and the decree was accordingly amended *nunc pro tunc* (see addition to record, p. 3).

An appeal was duly allowed and a *supersedeas* bond was filed in the penalty of six hundred thousand dollars (record, p. 89), which has operated as a stay of the enforcement of the ordinance.

ASSIGNMENT OF ERRORS.

1. That the court below erred in not holding that the ordinance of October 15, 1900, impaired the obligation of the contract embodied in the charter of the People's Company.

2. That the court below erred in holding that its jurisdiction did not extend to the question of the power of the city council to regulate gas rates.

The jurisdiction of the Circuit Court was based solely upon the ground that the suit was one arising under the Constitution of the United States. The fundamental allegation of the bill was that the ordinance of October 15, 1900, impaired the obligation of the charter contract which bound the legislature not to authorize the city council of Chicago to compel the People's Company to furnish gas at a less rate than three dollars per thousand feet. The city claimed that it had been duly authorized to pass the ordinance under and by virtue of the City and Village Act of 1872. Hence the controversy.

As was said by Mr. Justice Brown, delivering the opinion of the court in *Walla Walla* v. *Walla Walla Water Co.*, 172 U. S. 1, 10:

> "We know of no case in which it has been held that an ordinance, alleged to impair a prior contract with a gas or water company, did not create a case under the Constitution and laws of the United States."

The court, at the present term, again sustained jurisdiction upon that ground in *Joplin* v. *Light Company*, 191 U. S. 150, 158. See also discussion *infra*, p. 56.

It will be assumed, as no longer open to question, that a court of equity has jurisdiction to restrain the enforcement of a void ordinance where such relief will avoid a multiplicity of suits and where there is no sufficient or adequate remedy at law for the protection of property interests. *Vicksburg Waterworks Co.* v. *Vicksburg*, 185 U. S. 65, 82; *Detroit* v. *Detroit Citizens' St. Ry. Co.*, 184 U. S. 368, 381; *Walla Walla* v. *Walla Walla Water Co.*, 172 U. S. 1, 11; *Wilkie* v. *City of Chicago*, 188 Illinois, 444, 446; *Cicero Lumber Co.* v. *Town of Cicero*, 176 Illinois, 9, 31–32; *City of Chicago* v. *Collins*, 175 Illinois, 445, 451; *Chicago Public Stock Exchange* v. *McClaughry*, 148 Illinois, 372, 381, and *Third Avenue R. R. Co.* v. *The Mayor, &c., of New York*, 54 N. Y. 159, 161, cited with approval in the recent case of *Hale* v. *Allinson*, 188 U. S. 56, 76. The general principles which govern the right to resort to equity in analogous cases are stated by Mr. Justice Harlan in *Smyth* v. *Ames*, 169 U. S. 466, at pages 517–518, and the remarks of Mr. Justice Brewer in *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S. 79, at p. 99, are quite applicable to the large and coercive penalties imposed in the ordinance now before the court.

The allegations of the amended bill of complaint in the case at bar are so detailed in regard to the injury to property rights threatened from the enforcement of the ordinance, as to warrant the statement that no case can be cited which presented a stronger group of facts showing the necessity of relief in equity (record, pp. 79–81). As to the remedy at law, it is shown that even a temporary necessity of defending against the enforce-

ment of the ordinance for the purpose of testing its validity in the courts would result in thousands of suits and very great pecuniary loss to the People's Company, an injury quite incapable of estimate in money; and it is clear that, even though the loss were capable of estimate, there could be no recovery, since the city of Chicago could not be held responsible. *Wilkie* v. *City of Chicago*, 188 Illinois, 444, 446. The anticipated injury was, therefore, irreparable and without adequate remedy at law.

The questions presented for adjudication will be discussed under the following heads, viz.:

I.—The validity, scope and effect of the contract relied on and the impairment of its obligation (pp. 18–34).

II.—The effect upon the contract in question of consolidation under the act of 1897 (pp. 34–50).

III.—The right to partial relief in any event and its necessary consequence (pp. 50–56).

IV.—The jurisdiction of the court below and of this court to determine the question of power of the city council (pp. 56–61).

V.—The power to regulate the price of gas has not been delegated by the legislature of Illinois to the city council of Chicago (pp. 61–100).

I.

THE VALIDITY, SCOPE AND EFFECT OF THE CONTRACT RELIED ON AND THE IMPAIRMENT OF ITS OBLIGATION.

The provision of the charter of the People's Company, relied upon as a contract the obligation of which would be impaired by the ordinance of the city council of Chicago of October 15, 1900, reads as follows (record, p. 28; pamphlet, p. 6):

> "But ten years after the passage of this act the common council of the city of Chicago may, by resolution or ordinance, regulate the prices charged by said company for gas; but said common coun-

> cil of the city of Chicago shall in no case be authorized to compel the said company to furnish gas at a less rate than three dollars per thousand feet."

Before discussing the validity and scope of this provision of the act of 1865, it is important to appreciate that no inquiry is involved as to the power of the legislature of Illinois to regulate the charges of gas manufacturers or others engaged in any business more or less impressed with a public interest. It was conceded below and is now conceded that the legislature of Illinois has the power to fix reasonable rates to be charged by gas companies. Nor is there any inquiry as to the power of a city council to stipulate in an ordinance granting the consent of the city to the laying of gas pipes that the charges of a gas manufacturer shall not exceed a stated price. The sole inquiry is whether or not the legislature of Illinois, although retaining unimpaired its own power to regulate, did or did not contract with the People's Company that the city council of Chicago would not be authorized to compel the company to furnish gas at a less rate than that specified in the act of 1865.

It should also be stated, in order to anticipate a repetition of the *argumentum ab inconvenienti*, that the People's Company is not claiming, as against the city of Chicago and its inhabitants, the right to exact three dollars per thousand feet for its gas, but admits that, having availed of the benefit of the so-called Consolidation Act of 1897 and thereby acquired the plants of other gas companies, it can now only charge the rate which it had been charging during the year immediately preceding the acquisition of such properties, namely, one dollar

per thousand cubic feet (sec. 11). Its contention, therefore, in effect is simply this, that the provisions of its charter protect it against action by the city council reducing the price of gas below one dollar per thousand feet, although it does not challenge, but on the contrary expressly concedes, the power of the legislature to regulate the price of gas and to prescribe reasonable rates. If the legislature of Illinois shall see fit to reduce the rate to be charged by gas companies below the price authorized by the act of 1897, it will be time enough then to consider the question whether such a low rate as seventy-five cents per thousand feet is reasonable and would afford just compensation to the People's Company, having due regard to the fair value of the service rendered to the city and its inhabitants and of the capital actually employed in this public business.

Another argument urged in the court below ought likewise to be at once disposed of, namely, that the contract was void because the regulation of gas companies was comprehended in what is generally called the police power of the state, and that a legislature cannot limit or bargain away the right to exercise the police power by a subsequent legislature. But the decisions of this court have surely settled that question, and there can no longer be the slightest doubt as to the power of a legislature to grant to a gas company the exclusive privilege to furnish gas to a particular city or the right to charge a particular rate. This point, it is submitted, was fully covered and set at rest in the case of *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650, 658, 670, where Mr. Justice Harlan,

delivering the unanimous opinion of the court, among other things, said:

> "It is true as suggested in argument, that the manufacture and distribution of illuminating gas, by means of pipes or conduits placed, under legislative authority, in the streets of a town or city, is a business of a public character. Under proper management, the business contributes very materially to the public convenience, while, in the absence of efficient supervision, it may disturb the comfort and endanger the health and property of the community. It also holds important relations to the public through the facilities furnished, by the lighting of streets with gas, for the detection and prevention of crime. An English historian, contrasting the London of his day with the London of the time when its streets, supplied only with oil lamps, were scenes of nightly robberies, says that 'the adventurers in gas-lights did more for the prevention of crime than the government had done since the days of Alfred.' Knight, vol. 7, ch. 21; Macaulay, ch. 3. . . . It is to be presumed that the legislature of Louisiana, when granting the exclusive privileges in question, deemed it unwise to burden the public with the cost of erecting and maintaining gas works sufficient to meet the necessities of the municipal government and the people of New Orleans, and that the public would be best protected, as well as best served, through a single corporation invested with the power, and charged with the duty, of supplying gas of the requisite quality and in such quantity as the public needs demanded. In order to accomplish what, in its judgment, the public welfare required, the legislature deemed it necessary that some inducement be offered to private capitalists to undertake, at their own cost, this work. That inducement was furnished in the grant of an exclusive privilege of manufacturing and distributing gas by means of pipes laid in the streets of New Orleans for a fixed period, during which the company would be pro-

> tected against competition from corporations or companies engaged in like business. Without that grant it was inevitable either that the cost of supplying the city and its people would have been made in some form a charge upon the public, or the public would have been deprived of the security in person, property and business which comes from well-lighted streets."

There is still another argument advanced on behalf of the city of Chicago which it may be proper and convenient to notice at the outset in view of the fact that it seems to have impressed the learned court below, namely, that the contract made in 1865 should be interpreted in the light of subsequent events and changed conditions, and that it was certain in 1865 that the legal tender dollar would some time rise to its true value and in the course of events that the cost of manufacturing gas was bound to grow less (record, p. 22). Yet, it had been supposed that if there was one proposition in our jurisprudence, or what, for want of a better term, may be called constitutional morality, that had been settled by the labors of this court, it was that the validity of a contract is to be determined by the conditions existing when the contract is made and not by what the future may have developed. Would it not, indeed, be an astonishing doctrine to announce that the obligation of a contract between a state and a corporation or individual is to be measured by the conditions which may happen to exist thirty-five or forty years after the contract was made! As Mr. Justice Jackson said in *Mobile & Ohio Railroad* v. *Tennessee*, 153 U. S. 486, 502:

> "Legislative contracts, especially, should be read in the light of the public policy entertained and the purposes sought to be accomplished at the time they

were made, rather than at a later period when different ideas and theories may prevail."

It is submitted, with the utmost confidence, that if the legislature in 1865, for the purpose of inducing the investment of capital and the undertaking of a great public improvement, had expressly stipulated that the People's Company might charge a specified rate for gas, the contract would have been inviolate and the legislature and the city could not have gotten rid of it except in the manner pointed out by Mr. Justice Harlan in the *New Orleans Gas* case above cited, namely—by condemnation, for under the constitution and laws of Illinois in force in 1865, there was no power to alter, amend or repeal the charter of the People's Company. In such a case, this court would declare, as has been declared so often, that as long as the contract existed, it must be observed according to the clear meaning of its language, and it would again teach the salutary lesson that "there is no wealth or power equal to that which ultimately comes to a state when in all her engagements she keeps her faith unbroken."[1]

In view, however, of the arguments urged in the court below, it may, perhaps, not be inappropriate to recall the surrounding circumstances when in 1865 the legislature of Illinois entered into the contract now before the court.

It was February 7, 1865, ten days before the surrender of the city of Columbia to General Sherman, a month before Lincoln's Second Inaugural, two months before Five Forks and Appomattox. It was a day of

[1] Mr. Justice Field in *Hartman* v. *Greenhow*, 102 U. S. 672, 682.

confident hope, but still of awful anxiety and uncertainty; a day when our President was writing that immortal message of malice toward none, but charity for all, and saying for the Nation that "with high hope for the future, no prediction in regard to it is ventured". Many were the doubters, and there was much to discourage; the great problem of paying the colossal national debt had to be solved; no one could foresee what convulsions would attend the disbandment of a great army and the return to normal conditions; educated foreign observers and patriotic Americans were apprehending disaster and ruin by reason of our inflated currency and unparalleled national debt, and our inspired leader was proclaiming that the fight might have to "continue until all the wealth piled by the bondman's two hundred and fifty years of unrequited toil shall be sunk." We have singularly misread the history of those dark days of February, 1865, if it can now be truly said that the legislature of Illinois and the capitalists who were asked to invest and hazard their money in this necessary public improvement were then contracting "in face of the certainty that the legal-tender would some day rise to its true value" (record, p. 22). In fact, there has been no period in our history when financial problems were more uncertain or the outlook for capital more gloomy and discouraging. Moreover, as is well known, the state of Illinois was then slowly recovering from a period of great financial depression and embarrassment, the history of which is traced in the Tenth Census Report on Valuation, Taxation and Public Indebtedness, 1880, pp. 623–626. Her credit was still at a low ebb and the credit of her municipalities was little

better. The city of Chicago at that time contained a population of only 178,492; the total valuation of all property was $64,709,177, and the total tax was $1,294,183. The city covered a limited district; its streets were mostly unpaved; it was to a great extent without sewers or sanitary improvements, and its streets were only partly lighted. The tax limit of the city had been reached; and its borrowing capacity was then and for many years continued to be insufficient for its needs. It is a matter of common history that the state of Illinois and her municipalities, particularly the city of Chicago, were then in the attitude of soliciting subscriptions of capital and endeavoring to induce investors in other states to undertake the risk of necessary public improvements for the benefit of the people, with the hazard of loss and perhaps financial ruin to the promoters; that neither the state nor the cities were then in a position to undertake necessary improvements such as the lighting of their streets and buildings by means of taxes or by the pledge of their credit, and that special inducements had to be offered to foreign capital. The inducement in the case at bar was reasonable protection against adverse action by the city council of Chicago. The rates of gas prescribed in section 4 of the original act of 1855, namely, two dollars per thousand feet to the city of Chicago, for public use, and two dollars and fifty cents per thousand feet to the inhabitants of said city, had proved unsatisfactory and were below the charge generally prevailing in other cities. Notwithstanding the provision of section 4 of the act of 1855, the People's Company, as the demurrer admits, had for several years

actually charged a gross rate of four dollars and twenty-five cents per thousand cubic feet, and a net rate of three dollars and seventy-five cents per thousand feet, which was the rate prevailing at the time the amendatory act of 1865 was passed (record, p. 31). When in 1865 section 4 was repealed and the company was left at liberty to charge a greater rate than two dollars, the legislature in the public interests provided that after the expiration of ten years the common council of the city of Chicago should have the right to regulate the price of gas, but with the proviso that the legislature should in no case authorize such common council "to compel the said company to furnish gas at a less rate than three dollars per thousand feet." An examination of the rates prevailing in other cities in 1865[1] will show that the rate of three dollars per thousand feet was not unusual or excessive. It was as matter of fact twenty per cent. lower than the People's Company was then charging. The legislature was not gifted with the power of seeing into the future; it dealt with existing conditions, and, so far as it could then judge of the public interests, the provision was a proper one, particularly as the legislature retained its own power to regulate as future developments might justify. Immunity from regulation *by the city council* below the specified rate, however, was stipulated for, and without it those investing their capital would presumably not have proceeded further with an enterprise the whole hazard and risk of which they were assuming.

The reason why the incorporators of the People's

[1] Bankers' Magazine & Statistical Register, vol. XIX.

Company exacted a provision in the charter protecting the company against action by the common council is obvious. The city was sure to be itself a large user of gas, and its council would be composed, in part at least, of men who were themselves private consumers of that gas, and who were elected to office by the votes of other consumers. Indeed, the city at the time of the passage of the ordinance of 1900 was itself a consumer of gas to the amount of upwards of five hundred and fifty thousand dollars per annum (record, p. 32). To have given the city unrestricted power to regulate the prices of the People's Company, would have made the city and its councilmen judges in their own cause, and would have given an opportunity for very likely abuses of power. It cannot, therefore, be seriously doubted that the provision of the charter of the People's Company that the "common council of the city of Chicago shall in no case be authorized to compel the said company to furnish gas at a less rate than three dollars per thousand feet" was deemed of the utmost importance by those who invested their capital in the enterprise. These investors might well be willing to risk their means upon the faith of the general legislature treating them fairly, and yet be unwilling to abide by the decision of the city's common council, all of whom and all of whose constituents would be personally interested in cutting down the price of gas as soon as they had secured the benefit of the erection of gas plants and the investment of capital therein. The possibility of abuse under such a condition of affairs is well illustrated by the case of the *Cleveland Gaslight & Coke Co.* v. *City of Cleveland*, 71 Fed. Rep. 610, 612, where the late Mr.

Justice Jackson, then Circuit Judge, among other things said:

> "The question that now faces the court is whether a municipal corporation, itself a consumer of gas, as alleged in the bill, in its corporate relation to the company, to the extent of $5,000 or $6,000 per month, can, under the legislative sanction conferred by section 2478 of the Revised Statutes of Ohio, fix, or has the constitutional right to fix, the terms or price at which itself and all other consumers shall pay for the gas furnished. It would be a fearful proposition—monstrously absurd and outrageous—if the legislature were to undertake to confer upon a citizen of Cleveland the right to say at what price services should be rendered to him, or what he should pay for goods and articles furnished him. There is hardly any law in this land that would make the party being furnished the judge of the price that he should pay, or would say that his arbitrary decision should fix the rights of the parties. The city of Cleveland has undertaken to do that thing under this section No. 2478, as disclosed by the bill."

Mr. Justice Jackson was but reiterating what Lord Coke had said centuries ago that "*non potest esse judex et pars*" (Coke Lit., sec. 212), and what Lord Chief Justice Hobart repeated in the famous phrase that "even an act of Parliament made against natural equity, as to make a man judge in his own case, is void in itself; for *jura naturæ sunt immutabilia*, and they are *leges legum*." *Day* v. *Savadge*, Hobart, 85.

It may be proper to add that it is not urged in the case at bar that a delegation of power to a city council to fix gas rates would be void because of interest; and it is not, therefore, necessary to discuss that question. Nevertheless, the deeply rooted principle obtaining among us against allowing any body of men to be the

judges in their own case emphasizes the fairness and propriety of now enforcing the stipulation solemnly made by the legislature of Illinois when in 1865 it promised that it would not authorize the city council of Chicago to reduce the rates below the specified figure.

At any rate, on the strength of this provision, many millions of the capital of the People's Company have been invested in its plant for manufacturing and distributing gas (record, p. 72). The state and city and the inhabitants of Chicago have had the full benefit of the contract. The provision in question is plainly a part, and an important part, of the contract between the state and the People's Company, and clearly comes within the doctrine of the *Dartmouth College* case and succeeding decisions, holding that such an enactment is a contract and that "justice and good policy alike require that the protection of the law should be assured to it." *The Binghamton Bridge*, 3 Wall. 51, 74. See also *Dartmouth College* v. *Woodward*, 4 Wheat. 518, 641; *Bridge Proprietors* v. *Hoboken Co.*, 1 Wall. 116, 145; *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650, 670; *New Orleans Waterworks Co.* v. *Rivers*, 115 U. S. 674, 680, and other familiar cases to the same effect.

It is, of course, appreciated that it is not within the province of the court to determine the wisdom, fairness, or impropriety of legislative contracts by means of which public improvements are secured, and that an apology ought to be made for such an extended introduction to the narrow question presented for adjudication. The only excuse for such prolixity is that the case is of vital importance to the appellant, and that a failure to notice or anticipate similar arguments may

have led the court below into what is conceived to be a decision based upon premises which quite disregarded the settled doctrines of this court.

A perusal of the language of section 3 of the act of 1865 must impress the court with the conviction that the provision means exactly what it purports to say, and can mean nothing else, namely, that the "common council of the city of Chicago, shall in no case be authorized to compel the said company to furnish gas at a less rate than three dollars per thousand feet," and that such language necessarily implies that the legislature will not delegate any such power to the city of Chicago. Of course, such a municipality has and can exercise no powers except those delegated by the legislature. *Atkin* v. *Kansas*, 191 U. S. 207, 220.

The legislature promised the incorporators that, if they would proceed with this public improvement, the city council should not have power at any time to reduce the rates below three dollars per thousand feet, although the legislature itself reserved the right so to do whenever the public interests demanded such action. It would be difficult to select words in the English language more clearly expressing the evident intention to secure to the People's Company immunity from interference on the part of the city council within the limits prescribed.

If words mean anything, the provision means, as plainly as language can express it, that the city *shall not be delegated the power* to compel the company to furnish gas to itself and its inhabitants at less than three dollars per thousand feet, as well as that the legislature shall not delegate that power to the city council. The

legislature is the source of all the city's power, and a contract that the legislature will not authorize the city to do a thing necessarily means that the city shall not have power to do it.

When the act of 1865 containing the provision now in question was passed, the constitution of Illinois did not contain the clause now found in the constitution of 1870 (art. II, sec. 14), that "No . . . law . . . making any irrevocable grant of special privileges or immunities shall be passed," nor did it contain any other clause preventing the state from granting an irrevocable right or privilege to any corporation.

The charter of the People's Company of 1855 granted authority "to lay pipes for the purpose of conducting the gas in *any* of the streets or avenues" of Chicago, "with consent of the city council," provided that "no permanent injury or damage shall be done to any street," etc., and granted the right "to manufacture and sell gas" throughout the city (record, p. 27). The city's consent in the ordinance of 1858 was equally extensive and embraced "*any* of the streets, avenues, highways, public parks or squares throughout said city" (record, p. 29). Such a consent extends to every existing and every new street, and is in perpetuity. *People ex rel. Woodhaven Gas Co.* v. *Deehan*, 153 N. Y. 528, 533, cited with approval in *Illinois Central Railroad* v. *Chicago*, 176 U. S. 646, 666; see also *Chicago Gas Light Co.* v. *People's Gas Light Co.*, 121 Illinois, 530, 538. It was, therefore, the legislature and not the city council that granted the franchise which extended to the whole city, and the consent of the common council was merely an administrative act limited to the laying

of pipes. *N. O. Waterworks* v. *La. Sugar Co.*, 125 U. S. 18, 32.

The amendment of the charter by section 1 of the act of 1865 could have had no other purpose than to make it clearer that the right to manufacture, supply and sell gas should extend to the whole city and "*any* streets, buildings, manufactories, public places or houses therein contained," and that the company should not only have the right to lay down gas pipes in and along *any* of the streets, alleys, avenues, or public squares of said city, but should have the right to use them (record, p. 28).

A perusal of these acts of 1855 and 1865 must make it evident beyond peradventure that the franchises granted to the People's Company extended throughout the whole city; and the consent of the city council, embodied in the ordinance of August 30, 1858, was equally comprehensive, as shown by the quotation made above, and it clearly extended to any of the streets, avenues, highways, public parks or squares throughout the city.

The learned court below suggested that the People's Company had originally manufactured and distributed gas only upon the west side of the city of Chicago, and that its south side and north side systems were acquired through merger or purchase under the act of 1897 (record, p. 22). It may be true that the People's Company up to 1897 had confined its principal operations to the distribution of gas upon the west side of the city, although its pipes and mains also extended into the south division (record, p. 34), and yet this would in no way affect the scope of its charter or of the

ordinance of 1858. The People's Company could not have surrendered or abandoned its right or duty in respect of any part of the city. Had it attempted to do so, it would have been held, under the Illinois decisions, to have constituted an illegal abandonment of a public duty. Thus, in the case of *Chicago Gas Light Co.* v. *People's Gas Light Co.*, 121 Illinois, 530, 538, among the questions presented was that of the power of the People's Company to contract with the Chicago Gas Light Company that it, the People's Company, should confine its operations to the west division of the city; and it was held that the company had no such power, and consequently that the contract was void. Speaking of the provisions of the charter of the Chicago Company, which in this respect are similar to the provisions of the charter of the People's Company embodied in the acts of 1855 and 1865 now before the court, Mr. Justice Magruder, delivering the unanimous opinion of the Supreme Court of Illinois, said:

> "Under its charter appellant had the right to make and sell gas to be used for lighting all the divisions of the city of Chicago and all of the streets and buildings therein. It had as much power and authority to lay pipes in the streets of the west division as in those of the north and south division. . . . The manufacture and distribution of illuminating gas by means of pipes or conduits placed, under legislative authority, in the streets of a town or city, is a business of a public character; it is the exercise of a franchise belonging to the state; the services rendered and to be rendered for such grant, are of a public nature. Where the right to make and sell gas to the city and its inhabitants, under the conditions here named, is conferred upon a company, it is so conferred as well for the benefit of the public as of the company."

Moreover, in addition to the grant in the charter of the People's Company and to the permission and authority conferred under the ordinance of 1858, the legislature, in section 3 of the act of 1897, expressly conferred upon all companies authorized to distribute gas in any city, the power to distribute it in any territory annexed to such city.

It would seem to follow that the charter rights of the People's Company expressly extend to any streets and avenues throughout the city of Chicago; that it is immaterial that its business had been for many years limited to one or two divisions; that if it had in 1897 or at any time prior to the consolidation extended its mains and pipes, it would have been entitled in respect thereof to all the rights conferred by its charter, and that since the consolidation it could lawfully have extended, as it actually did extend, its plant under its own charter and ordinance (record, pp. 72–75). It now remains to consider whether the contract right to immunity from regulation by the city council was surrendered or lost by the acquisition and use of the plants of other gas companies under the Consolidation Act of 1897.

II.

THE EFFECT UPON THE CONTRACT IN QUESTION OF CONSOLIDATION UNDER THE ACT OF 1897.

The recent decision of the Supreme Court of Illinois in the case of the *People ex rel. Deneen* v. *People's Gas Light & Coke Co.*, supplementing the prior decision in *People's Gas Light & Coke Co.* v. *Hale*, 94 Ill. App. 406, 421, has settled the important, if not con-

trolling point, that a *new* corporation was not created by the proceedings taken under the act of June 5, 1897. It can, therefore, no longer be argued that by the consolidation agreements a new corporation was created; and it follows that the authorities which have heretofore been principally relied upon by the city have no application. The appellant, The People's Gas Light and Coke Company, is exactly the same corporate entity as existed prior to the acquisition by it of the properties of other gas companies in 1897. Indeed, acting under and by virtue of the act of 1897, it was impossible to create a *new* corporation, for the act itself forbade it, and expressly provided that the only consolidation and merger thereby authorized was "into a single corporation, which shall be one of said merging and consolidating corporations," and as if to prevent the slightest possibility of misunderstanding, section 8 of the act expressly provides that—

> "The companies, parties to the agreement or agreements, which provide for consolidation and merger, shall thereupon be and are hereby declared to be consolidated and merged into the one corporation specified in such agreement or agreements."

See also particularly the wording of sections 9 and 10.

Delivering the opinion of the Supreme Court of Illinois in the recent *quo warranto* proceedings, Mr. Justice Wilkin, after repeated references to the present People's Company as the corporation organized under the acts of 1855 and 1865, and carrying on business thereunder, used the following language (pamphlet, p. 61):

> "Although the general rule is that the consolidation of several corporations into a new one invests the latter with all the rights and privileges

of the several constituent companies, *such is not the result of consolidation or merger under this statute.* Section 2 expressly provides that the consolidation and merger into a single corporation must be into one of the merging and consolidating corporations, which by section 11 shall be, at the time of availing itself of or accepting the benefits of the act, in the actual business of furnishing gas to consumers. By the last clause of section 8 it is provided:

'The companies, parties to the agreement or agreements, which provide for consolidation and merger, shall thereupon be and are hereby declared to be consolidated and merged into the one corporation specified in such agreement or agreements.' While section 9 makes the consolidated corporation subject to, and requires it to perform for each of the companies so entering into said agreement or agreements, the legal obligations resting upon each of them, respectively, under their respective charters and ordinances, in the same manner and to the same extent as if the companies had remained individual and distinct, it does not confer upon it any enlarged powers or privileges. Moreover, there is nothing whatever in the petition to show that the rights, privileges and franchises of any or either of the consolidated or merged companies are larger or in any way different from those of the respondent."

There can, therefore, be no reasonable doubt, as well under these decisions and the allegations of the amended bill of complaint as by the terms of the Consolidation Act of 1897, that it is the original People's Company that has acquired and now owns the property of the other gas companies, that the People's Company is actually furnishing the gas in question, and that this business is being conducted under its charter and under the consent of the city embodied in the ordinance of 1858, which embraced the whole city.

Had the People's Company laid its own mains and pipes in all the divisions covered by the other companies, no one could have questioned the application of its charter. The consent given in 1858 remains in full force and effect. What possible difference can it make that, instead of laying new pipes, it acquires and uses pipes laid by other companies? It can even now lay new pipes alongside of the pipes of those other companies. Is it to be declared as the legal result contemplated and intended by the legislature that the mere acquisition and use of the plants and pipes of the other companies deprives the People's Company of its own charter rights? Is it to be supposed that the history of the pipes through which the company now supplies gas is to determine whether *its* rates shall or shall not be subject to reduction by the city council below one dollar per thousand feet?

It has, indeed, been decided in the case of the *People's Gas Light & Coke Co.* v. *Hale*, 94 Ill. App. 406, 421, that it is the People's Company that is supplying the gas and not any other, for Mr. Justice Windes, delivering the opinion of the court, among other things, said in regard to the effect of the Consolidation Act of 1897:

> "A reference to this section [sec. 11] and the first section of the act makes it plain that the price which should not be increased after the consolidation, is the price which was charged by the company into which other companies are consolidated and merged under the act. The company to which other companies may sell or transfer their rights, franchises and privileges must, under the first section of the act, be a 'gas company doing business in the same city, town or village,' and that

company, under the section quoted, must have been, at the time of the sale or consolidation, 'in the actual business of furnishing gas to consumers.' From this it is evident that the language in section 11, viz., 'Such corporation shall not increase the price charged by it for gas,' etc., refers to the company in which the other companies were consolidated, or to the purchasing corporation, and to the price charged by it for gas in the same city for any part of the year immediately preceding the consolidation."

The People's Company under its charter had unrestricted power to purchase real estate and to erect thereon such manufacturing plant as it should see fit without the consent of the city council, and the only thing which prevented it, before the passage of the act of 1897, from purchasing the real estate and plants of the other companies, was that *they* had no authority to sell and were competing companies. *People* v. *Chicago Gas Trust Co.*, 130 Illinois, 268, 302, 303. The act of 1897 having permitted such sale and purchase, what difference is there between land acquired by the People's Company from other companies, and land acquired from any party, or between a gas manufacturing plant bought by the People's Company from any of those companies, and a similar plant erected by it on land bought from other parties? Is it possible that the right of the city council to regulate the price of gas furnished by a company formed since 1870 can affect the real estate which a statute has authorized that company to dispose of to a company organized under a special act prior to 1870? The right to hold real estate was derived from the People's Company's charter and the act of 1897 and not from any city

ordinance. Moreover, the city having consented that a gas factory should be erected on a given spot, and the state having authorized its disposition to another company, why should the city's power to regulate the price of gas made by the original company in that factory attach to the factory or pipes so as to follow them into the hands of a company over whose prices the city has no power of regulation?

The act of June 5, 1897, was enacted with knowledge on the part of the legislature, derived from its own special enactments, that the People's Company might acquire the properties of the other gas companies, and that the latter would turn over their properties to the People's Company. A merger had already been attempted, but had failed because there was no statute authorizing it. *People* v. *Chicago Gas Trust Co.*, 130 Illinois, 268, 283. In fact, the act reads as if it had been drawn with especial reference to the wishes of these Chicago companies as well as the interests of the people. It was realized that competition and other circumstances had greatly reduced the price charged for gas, and it was provided in the interest of the people that those prices should never be increased. It was also realized that the People's Company's charter contained a clause of considerable importance, preventing the city from regulating the price of gas. Had the legislature intended to impair the force of that clause in any way, it would have been very easy to provide for a termination of all the old charters and the formation of a new company. The familiar cases in this court upon the point clearly indicated to all concerned that this was the proper

course if existing privileges or immunities were not to survive and continue in full force and effect. That this was not done, that the act expressly provides against impairment of any franchises, licenses, or privileges, and that it also clearly indicates that the company purchasing the others, or into which the others consolidate, shall continue its existence under its original charter, prove that the legislature intended that the provisions of the People's Company's charter or of the charter of any other purchasing company should not be lost. The subject was distinctly before the legislature, and it practically declared that the only conditions it would impose in limitation of existing powers and rights was that the charge for gas should not exceed what the purchasing company was then charging and that the quality should be preserved. Upon such a construction of the act, the parties interested in the existing companies had a right to rely, and it cannot be doubted that they did so rely.

Nor is there any conflict or repugnance between this general legislative declaration and the specific stipulation in the charter against action by the common council. The legislature could have enacted both provisions in the one statute without necessary inconsistency. It could have declared that whatever it might see fit itself to do in the future as the sovereign legislative body of the state, whether to increase or decrease the rate as circumstances might warrant, nevertheless the People's Company should be protected against the possible abuse by the city council of any such power of regulation, provided it did not increase its charges beyond those then prevailing.

The learned court below said that the city's power over rates(whatever that power might be) as regards the plants of companies formed since 1870, could not have been affected by the People's Company's acquisition of those plants, because "no consent of the city has been given to the merger" (record, p. 23). It is submitted that the consent of the city to any purchase or merger was not essential. The legislature's power was supreme. *Town of Cicero* v. *City of Chicago*, 182 Illinois, 301, 309; *Cicero Lumber Co.* v. *Cicero*, 176 Illinois, 9, 22; *Atkin* v. *Kansas*, 191 U. S. 207, 220; *Williams* v. *Eggleston*, 170 U. S. 304, 310; *New Orleans* v. *N. O. Water Works Co.*, 142 U. S. 79, 91. It authorized the acquisition of the plants of other companies, and the right to operate, use and maintain was necessarily included. There is nothing in the act of 1897 to support the idea that the legislature contemplated that a consolidation, merger or purchase could not become effective until the city council had given its consent. On the contrary, it did not intend that the city should have anything to say in connection with any steps authorized to be taken. But, were this not so, the consent of the city has been given unqualifiedly and in the most effective way. After the People's Company had acquired the plants of the other companies, the city continued with that company the arrangements for lighting the streets, public buildings, etc., formerly made with the other companies and recognized that company as authorized and obligated to operate the plants of the other companies. On eighteen different occasions between May 2, 1898, and March 11, 1901, inclusive, the city *ordered* the People's Company to lay

gas mains in streets which formerly did not have them, and to supply the residents with gas, although in many instances the streets were contiguous to the territory at one time occupied by the companies whose plants the People's Company had acquired (record, p. 69). These acts of the city manifested in the most emphatic way its consent to what had been done under the act of 1897, and should estop it from now claiming the contrary.

The People's Company does not contend that in acquiring the plants of other companies, it did not assume the obligation to perform any contracts between the existing corporations and the city of Chicago. It may be conceded that so far as any existing company had contracted with the city not to charge more than a given rate in respect of its plant, the People's Company must observe the obligation. That contingency was contemplated by the legislature, and it was satisfied to provide practically that the rate should not exceed one dollar per thousand feet, which was lower than the rate for illuminating gas to private consumers contained in any existing contract. Therefore, so far as the public were concerned, they were not prejudiced by consolidation, and no contract that the city had as to rates was injuriously affected. On the contrary, it was benefited by the reduction.

Of course, it cannot be argued that, as to the properties of the existing corporations acquired by the People's Company, the latter assumed any greater obligation than was resting on the companies transferring their plants. In the case of each and every com-

pany which had a contract with the city fixing a maximum rate embodied in the consent to lay its pipe, the city council had no power to amend that contract at its will. The doctrine of the cases of *People* v. *West Division Ry. Co.*, 118 Illinois, 113, 118, and *Detroit* v. *Detroit Citizens' St. Ry. Co.*, 184 U. S. 368, 397, would clearly prevent any such attempt to so amend the city's consent after acceptance by the gas companies.

But even if this were not so and even if the consolidation involved a breach of contract between the city and one or more of the consolidating companies, the legal rights of the People's Company could not be affected. Conceding, for the sake of argument only, that one or more of the consolidating companies had no right as against the city to dispose of their property to the People's Company, that fact would not bear in any way upon the question of the right of the latter to charge a given rate *for gas supplied by it.*

The learned court below suggested that as, under section 9 of the act of 1897, the purchasing or consolidated corporation should be subject, for each of the other companies, to all the legal obligations resting upon them respectively, such purchasing or consolidated corporation must, to that extent, "submit to the state's right of reasonably regulating the price of gas from time to time," as one of those obligations (record, p. 24). That may be conceded, and not in any way affect the right of the People's Company to be protected against the action of the city council as to gas supplied *by it.* The words of the act are, "legal obligations now resting upon each of them, respectively, under their respective charters and

ordinances" (sec. 9). Such words would cover the obligation to furnish gas at prices not exceeding those named in the several ordinances under which the respective companies were originally permitted to lay their mains in the streets and begin business, and it does not appear that the People's Company has failed in the slightest degree to perform any of those obligations; but it would be stretching the words unwarrantably to hold that there can be an obligation *now* resting upon a corporation to conform to an ordinance which has not yet been passed. Certainly this language cannot refer to any later date than the date of the purchase or consolidation.

Section 9 of the act of 1897, it should be noted, preserves the legal obligations of the old companies to precisely the same extent whether there is a purchase or lease, or a consolidation and merger. It is, therefore, immaterial whether the People's Company acquired the property of the old companies in the one way or in the other. In neither case, it is submitted, would its acquisition of those properties and franchises involve any obligation to comply with ordinances not in force at the date of such acquisition.

In order to test the question further, let us suppose that the People's Company had by its charter been limited to say fifty cents per thousand feet and had then acquired by legislative authority the property of several other gas companies authorized to charge more. Would it for a moment have been doubted that the charter limitation upon the prices of the People's Company applied to all gas thereafter *supplied by it* even though through mains at one time belonging to the other

companies? The complete and sufficient answer would have been that it was the charter of the People's Company which was the measure of its rights and duties.

Innumerable cases were cited by the city to sustain the proposition that, upon consolidation and the creation of a new corporation, existing immunities from taxation or regulation will not survive unless that be distinctly provided in and by the statute authorizing consolidation or merger. It is not deemed necessary to discuss and distinguish these cases. It has never been intimated in any case that, where no new corporation was formed, the old company into which others were merged lost any of its charter rights and powers by merely acquiring the property of other companies. That is the question now presented.

The principal argument and reliance on the part of the city of Chicago appears to be that it was the intention of the legislature, in and by the language of section 9 of the act of 1897, to provide that every corporation purchasing or leasing under section 1, or consolidating under section 2, should lose or forfeit all of its existing powers, privileges or immunities, except so far as might be necessary for the protection of its separate creditors or mortgagees, and that consequently every corporate power, privilege and immunity contained in the People's Company's charter must be deemed "suspended until the protection of such creditors or mortgagees shall require their resumption, when such suspension shall cease so far as, and for such time as, the protection of such creditors or mortgagees may require."

If this argument be sound, the necessary and inevitable result, following the city's argument to its logical conclusion, must be that, although no new corporation is or can possibly be created by consolidation under the act of 1897, nevertheless, in the case of purchase or lease or consolidation alike, the exercise of all the powers and the enjoyment of all the privileges and immunities of the corporation acquiring the property of other gas companies must be deemed suspended. In other words, it is seriously submitted that in the case at bar all the powers, privileges and immunities of the People's Company are to be deemed suspended, and that it has now no right to exercise any corporate power, privilege or immunity whatsoever!

If it be suggested that this *reductio ad absurdum* is but a mere play upon words, or a sophistical process of induction, it is with all confidence submitted that there can be no other result if we are to adopt the construction placed by the city of Chicago upon section 9.

Of course, it is obvious that this construction is not the true one, and that the legislature was dealing with the question of the *separate* rights, titles, interests, powers, privileges and immunities of the companies transferring their property to the acquiring company. The plain meaning of the language used and the grammatical construction clearly show that the rights, powers, privileges and immunities which are to be preserved for the benefit of creditors and mortgagees and suspended until the rights of creditors and mortgagees require their assertion, are those of the companies selling or leasing under section 1, or disposing of their prop-

erty by consolidation under section 2. In the case at bar, as appears by the amended bill of complaint, the original companies all had creditors and issues of mortgage bonds (record, pp. 75, 76). Such mortgages undoubtedly covered the franchises, powers, privileges and immunities of the existing companies, and, in order to avoid an impairment of the obligation of the contracts of mortgage, it was necessary that those franchises, powers, privileges and immunities should, to that extent, be preserved. The intention plainly was to preserve "the *separate exercise* of their respective powers and the *separate enjoyment* of their *separate* privileges and immunities," but not in any way to qualify or limit the joint exercise or joint employment by the acquiring corporation so far as might be necessary to effectuate the purchase, lease or consolidation.

It would be an absurdity for a legislature to provide in one breath that there should be no new corporation created by the consolidation, and in the next breath provide that all the corporate powers, privileges and immunities of the company acquiring the property of other corporations should be suspended.

Moreover, in framing the Consolidation Act of 1897, the legislature of Illinois had in mind and expressly dealt with the subject of regulating the price to be charged for gas by any corporation "into which any company or companies are consolidated and merged under this act"; and therefore specifically provided that such corporation "shall be subject to the following provisions," viz. (sec. 11):

> "Such corporation shall not increase the price charged by it for gas of the quality furnished to

consumers during any part of the year immediately preceding such purchase or lease, or such consolidation and merger.

Such corporation shall furnish gas to consumers as good in quality as it furnished previous to such purchase or lease, or such consolidation and merger."

The understanding by the legislature of the language it was thus using cannot be in doubt. Presumably it knew existing conditions as disclosed by its own legislation, and it intended to regulate the price to be charged for gas by any such consolidated corporation as clearly as though it had declared that intention in so many words, *e. g.*, that the People's Company, if "availing itself of or accepting the benefits of this act," should thereafter not increase its price above the rate of one dollar per thousand cubic feet, which it was then charging.

Let us state the converse of the present proposition, and suppose that one or more of the companies whose property was acquired by the People's Company then had valid contracts with the city giving them the exclusive right for a term of years to furnish gas in a certain division of the city or in one of the towns or villages annexed to the city, at the rate of two dollars per thousand feet (which is practically the case as to at least one of the companies). Would the People's Company, "into which such company or companies [were] consolidated and merged under this act", have been entitled to charge the two dollar rate in any part of the city? Certainly not; because the plain and unmistakable language of section 11 of the act of 1897 would preclude any such charge. It would have been held, as in the case

of *People's Gas Light & Coke Co.* v. *Hale*, 94 Ill. App. 406, 421, that the legislature had regulated the subject of prices to be charged by the acquiring or consolidated company and had prescribed the rate. It would be said, and conclusively said, that the legislature had regulated the price, and that such regulation was absolutely binding upon any corporation availing of and accepting the benefits of the act of 1897, anything contained in the charters or ordinances of the other companies to the contrary notwithstanding.

The contention of the city, however, would seem to be that the provision of section 11 of the act of 1897 should read as if the legislature had added the words, "but such price shall be subject to reduction by the city council of cities from time to time." This contention cannot deserve further consideration than to state it, for it is not within the power of any court, in the interpretation of statutes, to add any such affirmative provision.

The legislature, in the act of 1897, did not suppose it was doing an unnecessary thing or that it was enacting a law which could be overthrown at the will of the city councils. It is not reasonable to assume that in enacting this specific regulation as to the price of gas to be charged by the purchasing or consolidated corporation, the legislature contemplated that it had already delegated to city councils the power to regulate gas rates and that these subordinate bodies, its creatures, would be vested with authority to practically nullify that which the legislature under its sovereign power had declared should be lawful. Yet that is the position of the city.

It is, therefore, submitted that, in view of the allegations of the amended bill of complaint admitted by the demurrer, the provision of section 3 of the act of 1865 restraining the action of the city council applies to all gas supplied by the People's Company to the city or to any other consumers, and that the power to regulate its charges below the rate of one dollar per thousand cubic feet can only be exercised by the legislature.

III.

THE RIGHT TO PARTIAL RELIEF IN ANY EVENT AND ITS NECESSARY CONSEQUENCE.

The learned court below did not decide that the consolidation had created a new corporation or that the People's Company had thereby lost its contract rights, but it ruled that it was unnecessary to determine whether or not the People's Company by the consolidation and merger had lost all its right to exemption from regulation of its rates *by the city council* as to its own plant and the pipes not acquired through consolidation, because the bill asked for no divisional relief. It is submitted that the court inadvertently fell into error, and that if any part of the bill was good and entitled the complainant to relief as to the gas furnished by it through its own plant and mains or pipes, it was error to dismiss the bill and deny all relief. The demurrer was general and covered the whole bill, and if any part of the bill was good, the demurrer necessarily failed and should have been overruled. Such has long been the established practice in equity. *Tivington* v. *Story*, 9 Peters, 632, 658; *Pacific R. R. of Mo.* v. *Missouri Pac. Ry.*, 111 U. S. 505, 520; *Heath* v. *The Erie Rail-*

way Company, 8 Blatchford, 347, 407; *Savannah, F. & W. Ry. Co.* v. *Jacksonville, T. & K. W. Ry. Co.*, 79 Fed. Rep. 35, 38; 1 Daniell's Ch. Pr. (6th Am. ed.), p. 579; Story's Equity Pleadings, sec. 443; Fletcher's Eq. Pleading & Practice, sec. 204; 1 Foster's Fed. Pr., sec. 107.

The People's Company was, therefore, in any event, entitled to some relief against the operation of the ordinance in question unless, of course, it is to be held that action under the statute of 1897 resulted in a loss of its rights.

The effect of granting partial relief, however, would be to give the ordinance an operation which it is inconceivable that the city council could have contemplated or intended.

If the ordinance cannot operate in the western division of Chicago and wherever the People's Company has itself laid pipes, it must be wholly void, for nothing can be more clear than the intention of the city council, as expressed in the ordinance, that it should operate in all parts of the city and upon the whole of the system of every gas company. Section 1 provides:

> "That *no corporation, company or companies, firm or persons manufacturing, selling, supplying or distributing gas in the city of Chicago* for illuminating or for fuel purposes shall charge, exact, demand or collect from any consumer thereof more than the sum of seventy-five (75) cents per one thousand (1,000) cubic feet of gas consumed or used."

Section 2 provides:

> "That *any company, corporation, person or persons who shall remove any meter or meters from the house, store, factory or premises of any consumer of gas in*

the city of Chicago, against the will and consent of any such consumer of gas who is willing to pay for gas furnished him, it or them by any such company, corporation, person or persons, and tenders the amount due at the price established and fixed in section 1 of this ordinance, shall be subject to a penalty of not less than twenty-five ($25) nor more than two hundred ($200) dollars for each and every offense."

And section 3 provides:

"That *any company, corporation, person or persons who shall, in violation of the provisions of the preceding sections, charge or require the city of Chicago, or any citizen thereof, or any consumer of gas therein*, to pay for gas furnished to it or them, or either of them, a sum in excess of seventy-five (75) cents per thousand cubic feet, or who shall furnish to the said city of Chicago, or any citizen thereof, manufactured gas less than twenty (20) candle-power shall be subject to a penalty of not less than twenty-five dollars ($25) nor more than two hundred dollars ($200) for each and every offense."

There could be no clearer case of judicial legislation than to hold that this intention, thus clearly and emphatically expressed, may nevertheless be disregarded, and the ordinance, by judicial interpretation, be made to operate only upon some persons in some parts of the city, as to which the ordinance might have been valid had the city council seen fit so to enact it. It would be wresting the ordinance from the purpose with which it was enacted, and making it serve a different purpose. *James* v. *Bowman*, 190 U. S. 127, 140.

There can, therefore, be no doubt that, if the city council had not assumed that the ordinance would operate uniformly, it would not have passed it, and would have done what it did a few weeks later, namely,

apply to the legislature for relief. To hold now that the ordinance is nevertheless to operate only in portions of the city, depending upon the history of the pipes through which the gas is supplied, would be to decree what the city council never intended to accomplish and would be judicial legislation beyond the power of any court. As Mr. Justice Matthews said in *Spraigue* v. *Thompson*, 118 U. S. 90, 95, in speaking of a statute which it was urged should be given partial effect—

> "But the insuperable difficulty with the application of that principle of construction to the present instance is, that by rejecting the exceptions intended by the legislature of Georgia the statute is made to enact what confessedly the legislature never meant. It confers upon the statute a positive operation beyond the legislative intent, and beyond what any one can say it would have enacted in view of the illegality of the exceptions."

See also *Pollock* v. *Farmers' Loan & Trust Co.*, 158 U. S. 601, 636; *Johnson* v. *State*, 59 N. J. L. 535, 539; *State* v. *O'Connor*, 5 N. Dak. 629, 632; *Jones* v. *Memphis*, 101 Tennessee, 188, 195.

Moreover, is it reasonable to assume that the legislature, in authorizing consolidation or purchase, intended such consequences, or would have passed the act of 1897 in its present form with any such idea in its mind, particularly as it dealt with the very subject of gas prices? Surely, no one will seriously argue that the legislature intended that, if the People's Company acquired the plants and pipes of the other companies, its charges should vary so that it might demand one dollar from consumers supplied by its own plant and less than that price from consumers supplied by the

plants purchased under the act, varying as the city councils might change their views or exercise their discretion.

To sustain this ordinance, as far as concerns gas made and supplied from the factories and pipes which originally belonged to the companies other than the People's Company, while declaring it invalid as far as concerns gas made and supplied from the pipes laid by the People's Company itself, would require much investigation and involve peculiar judicial complications. The reason is that, owing to necessary changes and improvements, the People's Company has itself removed a great part of the original plants of these other companies and has substituted an improved plant in its stead, and that such of the original plants of these other companies as remains is so intermingled with the plant constructed by the People's Company (which, even before the consolidation, had power to carry on its business in any part of the city) that the gas made and supplied from the former plants cannot practically be separated from that made and supplied from the latter (record, p. 74). The demurrer concedes these facts. If this practical inconvenience result from purchase or consolidation, the sufficient answer must be that the legislature must be presumed to have contemplated the consequences of its enactment, and, so contemplating, to have dealt with the subject of rates in and by section 11 of the act of 1897.

Even if this were not so, and the streets and buildings supplied with gas from plants to which the city's power to regulate prices extended could be distinguished from other streets and buildings, the ordinance

would be void, because it would operate to establish two rates—the People's Company's rate of a dollar per thousand feet for gas supplied to certain streets and buildings, and the city's rate of seventy-five cents per thousand feet for gas supplied to certain other streets and buildings—without any ground for the distinction except that one street or building was supplied from one plant, and another street or building from another plant *of the same company.*

Such an ordinance, even if intended by the city council, would be utterly unreasonable. The regulation of prices for public service has a two-fold aspect: it is a rule of conduct for the public service corporation, and it affects the pockets of all citizens and corporations using the public service, and even of the city itself. As regards both the producers of gas and the consumers, such a regulation must be uniform in order to be reasonable. The legislature cannot be presumed to have intended to authorize any such unreasonable condition of affairs as different rates in the same city and varying according to the ownership or history of the pipes supplying the gas.

There is one vital difference between the power of taxation and the power to regulate prices. Taxation ought, as a matter of sound public policy, to be reasonable, but need not be so except in so far as the power of taxation has been limited by constitutions or statutes. State or municipal regulations of prices, on the other hand, *must* be reasonable and equal as to all, and if not so, they are void. Even in the case of taxation, uniformity is so desirable that the constitution of Illinois expressly requires it (art. IX, sec. 1). All the more,

then, must the regulation of prices (an exercise of a power much more limited than that of taxation) be uniform, if it is to be upheld as reasonable. An ordinance which says to one man, "you shall be supplied with gas at a price twenty-five per cent. less than your neighbor in the next street must pay," is utterly lacking in uniformity and reasonableness. It introduces local distinctions, and arbitrarily benefits certain parts of the city to the exclusion of the others. Such a result should never be permitted, especially when the legislature has ample power to regulate the subject and afford relief. No court of law or equity, it is submitted, should enter a decree which would have the inevitable result of establishing an ordinance of such a character, when it is inconceivable that the legislature ever intended to authorize or the city council ever intended to pass such an unequal and unreasonable provision.

IV.

THE JURISDICTION OF THE COURT BELOW AND OF THIS COURT TO DETERMINE THE QUESTION OF POWER OF THE CITY COUNCIL.

The learned court below declined to determine the question of the power of the city council to pass any ordinance regulating the price of gas on the ground that its jurisdiction did not extend to that question (record, p. 24). The reasoning by which this conclusion was reached, as set forth in the opinion, overlooked the authorities establishing the jurisdiction and duty of the court to decide the entire cause.

It is evident from the language of the opinion of the court below that it did not regard the allegations of the federal question as frivolous or fictitious or made for

the purpose of imposing upon the court, and that it did not decline jurisdiction upon any such ground. There is not the slightest suggestion that the suit was not one in good faith alleged to arise and actually arising under the Constitution of the United States. On the contrary, the court recognized as "fundamental that no city or state can constitutionally enact any legislation that impairs the validity of existing contracts" (record, p. 86), and, referring to the charter provision relied on as embodying an inviolable contract, said that "the interpretation of the clause is not free from considerable difficulty." Within the language of every decision on the subject, the presence of a substantial federal question invests the Circuit Court of the United States with jurisdiction to hear and determine not only the federal question but every other question involved in the controversy. *Penn Mutual Life Insurance Co.* v. *Austin*, 168 U. S. 685, 695; *Horner* v. *United States*, *No. 2*, 143 U. S. 570, 577; *In re Sawyer*, 124 U. S. 200, 220; *Railroad Co.* v. *Mississippi*, 102 U. S. 135, 141; *Tennessee* v. *Davis*, 100 U. S. 257, 270; *The Mayor* v. *Cooper*, 6 Wall. 247, 252; the case of *Omaha Horse Ry. Co.* v. *Cable Tramway Co.*, 32 Fed. Rep. 727, 729, decided by Mr. Justice Brewer, is on all fours; see also *Osborn* v. *U. S. Bank*, 9 Wheat. 738, at p. 821.

The city of Chicago insisted below and will insist in this court that it has legislative authority to pass the ordinance in question. It is that claim and that claim alone which creates and compels the pending litigation. A rule which would require the People's Company first of all to litigate the question of power in a state court

in order to determine whether the city was right or wrong in its assumption of power and then come into a federal court to litigate the federal question, would be most cumbersome and impracticable. The proper practice in such a case is clearly to bring the whole controversy into one suit, and if there be a *bona fide* federal ingredient and a claim actually arising under the Constitution of the United States, the suit may be brought in a federal court as a matter of constitutional right; and in that suit, the whole controversy should be determined once for all. *Interest reipublicæ ut sit finis litium.*

In its last analysis, the position of the defendant in the court below upon this point appeared to be that unless the appellant, People's Company, was prepared to concede the power of the city council to pass the ordinance in question, it could not sue in a federal court to protect its contract rights. This, it is submitted, is a novel doctrine, and would deprive the circuit courts of the United States of much of the jurisdiction intended to be conferred by the act of Congress. The contract right and its impairment being the fundamental and essential feature of the controversy, why should not the appellant have the right to invoke the jurisdiction and protection of the federal courts against the enforcement of an ordinance asserted to have been "passed under supposed legislative authority" and which the city is insisting is valid by virtue of legislation delegating the power and indisputably subsequent to the alleged contract? The jurisdiction of a circuit court was expressly sustained by this court in the analogous case of *Hamilton Gas Light Co.* v. *Hamilton City*, 146 U. S. 258, 266, because there it appeared

"that the defendant grounded its right to enact the ordinance in question" upon supposed legislative authority embodied in an enactment subsequent to the alleged contract right. Of course, where the ordinance is obviously not of such a character as to impair the obligation of the contract at all, even conceding complainant's construction of the contract, as in *St. Paul Gas Light Co.* v. *St. Paul*, 181 U. S. 142, or where the claim of a federal question clearly has no substance or foundation, as in *New Orleans Waterworks Co.* v. *Louisiana*, 185 U. S. 336, a very different point is presented. See also *Sawyer* v. *Piper*, 189 U. S. 154, 156; *Equitable Life Assurance Society* v. *Brown*, 187 U. S. 308, 311; *Swafford* v. *Templeton*, 185 U. S. 487, 493; *Vicksburg Waterworks Co.* v. *Vicksburg*, 185 U. S. 65, 82; *Illinois Central Railroad Co.* v. *Adams*, 180 U. S. 28, 36; *New Orleans Waterworks Co.* v. *Louisiana*, 185 U. S. 336, 345; *McCain* v. *Des Moines*, 174 U. S. 168, 181; *St. Joseph & Grand Island R'd* v. *Steele*, 167 U. S. 659, 662. But where the subject matter of the controversy is essentially federal, as the protection from impairment of the obligation of a contract, and the bill of complaint contains the proper allegations in legal and logical form (record, pp. 77–79, 82), a controversy arising under the Constitution of the United States is then presented, which is within the jurisdiction of a circuit court notwithstanding the fact that the federal question may ultimately be adjudged against the complainant. Such a "suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction of the Constitution." *Defiance Water Co.* v.

Defiance, 191 U. S. 184, 191. The jurisdiction, having once attached because of the fundamental federal ingredient, extends to every question which it may be necessary to decide in order to afford complete relief or to dispose of the entire subject matter of the controversy. *City Railway Co.* v. *Citizens' Railroad Co.*, 166 U. S. 557, 564; *Ober* v. *Gallagher*, 93 U. S. 199, 206; *Ward* v. *Todd*, 103 U.S. 327, 329, and cases *supra*, p. 57.

As to the jurisdiction of this court, however, numerous decisions settle the proposition that, on a direct appeal from a circuit court under the act of 1891 "in any case that involves the construction or application of the Constitution of the United States," this court is not restricted to the consideration of the federal question but acquires jurisdiction of the entire case and of all questions involved in it. *Davis & Farnum Mfg. Co.* v. *Los Angeles*, 189 U. S. 207, 216; *Scott* v. *Donald*, 165 U. S. 58, 73; *Press Publishing Co.* v. *Monroe*, 164 U. S. 105, 111; *Chappell* v. *United States*, 160 U. S. 499, 509; *Casey* v. *Houston, &c., Ry. Co.*, 150 U. S. 170, 181; *Horner* v. *United States, No. 2*, 143 U. S. 570, 577; *N. O. Waterworks* v. *La. Sugar Co.*, 125 U. S. 18, 32.

It will, therefore, be assumed that the court below had jurisdiction and that it was its duty to decide the question of the power of the city council under the laws of the state of Illinois in view of the specific allegation of the amended bill of complaint that the ordinance had been passed unlawfully under claim of power (record, pp. 77-78). This being so, the question is clearly within the jurisdiction of this court to review and now determine.

V.

THE POWER TO REGULATE THE PRICE OF GAS HAS NOT BEEN DELEGATED BY THE LEGISLATURE OF ILLINOIS TO THE CITY COUNCIL OF CHICAGO.

Assuming that the benefit of the provision of section 3 of the act of 1865 has been in some way surrendered or lost and that the People's Company cannot avail of its protection even as to the gas supplied by it through its own plant and the mains and pipes laid under the ordinance of 1858, it is nevertheless submitted that the demurrer should have been overruled upon the ground that the ordinance of October 15, 1900, was void because the power to pass it has not been delegated to the city council by the legislature of Illinois.

In the court below, the supposed legislative authority of the city council was based upon two claims: the first being that the act of 1865 itself conferred the power without any limitation, and the other being that the power was conferred by certain provisions of the City and Village Act of 1872 under which the city of Chicago as now constituted was incorporated (Laws of Illinois, 1871-1872, pp. 227-234, 259; *Harmon* v. *City of Chicago*, 110 Illinois, 400, 411; *Chicago Packing and Provision Co.* v. *City of Chicago*, 88 Illinois, 221, 223).

The first proposition relied on by the city is somewhat difficult to state. We must confess that it is altogether too subtle for us to attempt to refute it, except so far as it refutes itself upon its face. The argument seems to be that the second clause of the provision in question must be regarded only as a restraint upon the legislature itself, leaving the first clause intact, and that by some process of reasoning about present and future

tenses and of supposed strict rules of statutory construction, the statute must be made to read as if the portion italicized below had never been enacted, viz:

> "Ten years after the passage of this act the common council of the city of Chicago may, by resolution or ordinance, regulate the prices charged by the said company for gas; *but said common council of the city of Chicago, shall, in no case, be authorized to compel the said company to furnish gas at a less rate than three dollars per thousand feet.*"

In other words, the contention of the city is that the legislature intended to grant to the city council unlimited power, and that the second clause meant nothing at all *as to the present* and should be treated as a nullity!

The second claim on the part of the city arises under the general grants of power to city councils to be found in the said City and Village Act of 1872 quoted below.

In determining the existence or non-existence of a particular municipal power, it is proper always to bear in mind, as stated by the Supreme Court of Illinois in *City of Chicago* v. *Blair*, 149 Illinois, 310, 318, that—

> "The tendency of municipal government to arrogate to itself power and to encroach upon the rights of the citizen has led to the establishment of the statutory rules of construction limiting its powers to those expressly granted, or arising, by reasonable and necessary implication, from the grant."

Such special statutory rules of construction are the result of fundamental principles established in the law of municipal corporations, which guide the courts in determining the powers of such corporations. The reasonableness, the necessity, and the salutary character of

these principles have often been indicated in judicial opinions, and, of course, are presumed to be familiar to the legislature in framing its statutes.

In the case of *Barnett* v. *Denison*, 145 U. S. 135, 139, Mr. Justice Brown, delivering the unanimous opinion of the court, said:

> "It is the settled doctrine of this court that municipal corporations are merely agents of the state governments for local purposes, and possess only such powers as are expressly given, or implied because essential to carry into effect such as are expressly granted."

This principle was reiterated in the strongest language at the present term in *Atkin* v. *Kansas*, 191 U. S. 207, 220.

And such is the settled doctrine in Illinois. Thus, in the recent case of *Coquard* v. *Village of Oquawka*, 192 Illinois, 355, 365 (1901), the court said:

> "This court, as well as the Supreme Court of the United States, has quoted with approval the rule laid down by Judge Dillon in his work on Municipal Corporations, that 'a municipal corporation possesses and can exercise the following powers and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation—not simply convenient but indispensable.' (*Cook County* v. *McCrea*, 93 Ill. 236; *Huesing* v. *City of Rock Island*, 128 *id.* 465; *Merrill* v. *Monticello*, *supra*[1].) 'Any reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied.' See, also, *Marsh* v. *Fulton*, 10 Wall. 676; *Ottawa* v. *Carey*, 108 U. S. 110; *Jonesboro* v. *Cairo*, 110 *id.* 192; *Kelly* v. *Milan*, 127 *id.* 139."

[1] 138 U. S. 673, 681.

In *Kiel* v. *City of Chicago*, 176 Illinois, 137, 141, the court said:

> "The power to pass an ordinance and impose a penalty for its violation is to be strictly construed, and is not to be extended, by implication, to persons or things not expressly within the terms of such power."

And in *Smith* v. *McDowell*, 148 Illinois, 51, 62, the court said:

> "These municipal corporations are instrumentalities of the state, exercising such powers as are conferred upon them in the government of the municipality. Their power is measured by the legislative grant, and they can exercise such powers only as are expressly granted, or are necessarily implied from the powers expressly conferred."

See also *Freeport Water Co.* v. *Freeport City*, 180 U. S. 587, 598; *Citizens' St. Ry.* v. *Detroit Railway*, 171 U. S. 48, 53; *Detroit Citizens' St. Ry. Co.* v. *City of Detroit*, 64 Fed. Rep. 628, 639; 22 U. S. App. 570, 590; *Old Colony Trust Co.* v. *City of Atlanta*, 83 Fed. Rep. 39, 44, affirmed 88 Fed. Rep. 859; *Cleveland City Ry. Co.* v. *City of Cleveland*, 94 Fed. Rep. 385, 396; *Laugel* v. *City of Bushnell*, 197 Illinois, 20, 27; *Town of Drummer* v. *Cox*, 165 Illinois, 648, 650; *City of Chicago* v. *McCoy*, 136 Illinois, 344, 353; *Seeger* v. *Mueller*, 133 Illinois, 86, 94; *Emmons* v. *City of Lewistown*, 132 Illinois, 380, 384; *Huesing* v. *City of Rock Island*, 128 Illinois, 465, 477; *Lewisville Natural Gas Co.* v. *State*, 135 Indiana, 49, 51; *City of Noblesville* v. *Noblesville Gas, etc., Co.*, 157 Indiana, 162, 167; *Muncie Natural Gas Co.* v. *City of Muncie* (Ind. 1903), 66 N. E. 436, 438; *In re Pryor, Petitioner*, 55 Kansas, 724, 727; *City of St. Louis* v. *Bell Telephone Co.*, 96 Missouri, 623, 628; *Wabaska*

Electric Co. v. *City of Wymore*, 60 Nebraska, 199, 202; *Schroeder* v. *Gas & Water Co.*, 20 Pa. Superior Ct. 255, 259; *Tacoma Gas & Electric Light Co.* v. *Tacoma*, 14 Washington, 288, 291; *State ex rel. Telephone Co.* v. *City of Sheboygan*, 111 Wisconsin, 23, 38.

In the light of these established principles, we may now analyze the statutory provisions relied on by the city of Chicago as conferring the power to fix or regulate the price of gas.

A.

It has never been contended on the part of the city of Chicago that the City and Village Act of 1872 conferred the power to fix the maximum price of gas in express terms. The only claim that has been advanced is that the power must be implied as incident to the following powers expressly granted to the city councils, viz.: (1) to provide for the lighting and to regulate the openings in streets, the erection of gas factories and the laying down of pipes, and (2) to regulate the police of the city and to pass and enforce all necessary police ordinances. These powers are conferred in and by the *eleventh*, *thirteenth* and *sixty-sixth* subdivisions of section 1, article V, of the City and Village Act of 1872, *supra* (1 Starr. & C. Ann. Stat. 2d ed., pp. 689, 694, 695, 707; pamphlet, pp. 7, 8, 14), which read as follows:

> "§ 1. The city council in cities, and president and the board of trustees in villages, shall have the following powers: . . .
>
> "*Eleventh.*—To provide for the lighting of the same [streets]."

"*Thirteenth.*—To regulate the openings therein [in streets] for the laying of gas or water mains and pipes, and the building and repairing of sewers, tunnels and drains, and erecting gas lights: *Provided, however*, that any company heretofore organized under the general laws of this state, or any association of persons organized, or which may be hereafter organized for the purpose of manufacturing illuminating gas to supply cities or villages, or the inhabitants thereof, with the same, shall have the right, by consent of the common council (subject to existing rights), to erect gas factories, and lay down pipes in the streets or alleys of any city or village in this state, subject to such regulations as any such city or village may by ordinance impose."

"*Sixty-sixth.*—To regulate the police of the city or village, and pass and enforce all necessary police ordinances."

The precise question of the power of city councils to regulate the price of gas has never been decided by the Illinois courts;[1] but the history of the subject and the contemporaneous and long continued interpretation of the city of Chicago itself, as well as the decisions in analogous cases, are most convincing against the claim that the legislature ever intended to delegate the power. It is submitted that it would overturn all the rules heretofore supposed to be settled as to the powers of municipal corporations to hold that such a power to regulate prices, one of the greatest and most far-reaching of all the powers of government, was to be implied from the grant of other powers. The language of such grants will not be

[1] The point was not involved or decided in the recent decision in the *quo warranto* proceedings. See pamphlet, p. 52.

broadened by implication so as to permit any interference with the management by a private corporation of its property not within the clear letter of the statute. *Chesapeake & Potomac Tel. Co.* v. *Manning*, 186 U. S. 238, 248.

From the time of the organization of the People's Company in 1855 until the year 1881, the city council does not seem to have ever conceived or entertained the idea that it had any power to fix or regulate the price of gas. During the year 1881, however, a proposed ordinance was framed entitled "An ordinance concerning gas companies," which was intended to license manufacturers of gas, to provide for its illuminating quality, and to regulate the charge therefor. This proposed ordinance was submitted by the city council to the corporation counsel then in office, Mr. Francis Adams, for his opinion, and on the 18th of October, 1881, he furnished an opinion to the effect that the council was without power to pass the ordinance. The opinion is printed at length in a book entitled "Opinions of the corporation counsel and assistants from January, 1872, to March, 1897," which was officially published in the latter year "by direction of the city council under the supervision of the corporation counsel," Mr. William G. Beale. The opinion of corporation counsel Adams was to the effect that the city council was "powerless to pass the bill" because the power had not been conferred by the legislature. It will be found printed at length at pages 41–42 of this official publication, and a copy is contained in the pamphlet filed with this brief at page 31 for convenience of reference.

This opinion of the corporation counsel was ac-

cepted as conclusive and was acquiesced in until 1890, when the city council again asked the opinion of the corporation counsel "as to the right of the city to regulate the price to be charged by the various gas companies, doing business in the city of Chicago, to the consumers of their product." An opinion was then furnished by the legal department of the city of Chicago signed by Mr. C. S. Darrow, assistant corporation counsel, in which the question was discussed at length. The conclusion reached was that the existence of the power was so exceedingly doubtful that it would be ill advised for the city council to attempt to exercise it. The opinion is printed at length in pages 147–149 of the official compilation above cited, and for convenience of reference is printed at length in the pamphlet filed with this brief.

In September, 1888, Mr. John W. Green, corporation counsel, furnished an opinion to the financial committee of the city council of Chicago upon the analogous question of the power to fix the rates to be charged for telephones. The opinion was against the existence of any such power in the city council, and among other things, Mr. Green said:[1]

> "It cannot be seriously contended that the express power to regulate the rates to be charged for telephones is embraced within the express charter powers of the city council."

In November, 1896, when Mr. William G. Beale was corporation counsel, he was asked for his opinion in regard to the power of the city council to fix telephone

[1] Official publication, pp. 111–115; pamphlet, pp. 38, 39.

rates, and rendered a very comprehensive opinion in which, among other things, he said:[1]

> "I think it is clear that the city of Chicago has no power to regu[illegible] telephone charges and rates."

The city council of Chicago again agitated the subject in 1899, when the corporation counsel then in office, Mr. Walker, was asked to furnish an opinion to the city council on the same subject, which was done under date of May 26, 1899, and which is also printed at length in the pamphlet submitted herewith. Mr. Walker, in that opinion, among other things, said:[2]

> "Until the recent cases of *Rogers Park Water Company* v. *Fergus*, 178 Ill. 571, and *People* v. *Suburban R. R. Co.*, 178 Ill. 594, I should have had, as already indicated, no hesitation in finding that a city council possesses no legal right to regulate the price of gas, except in those cases where the regulation is inserted in an ordinance as a condition to the grant of a franchise to the gas company. . . . The most that can be said is that I believe it doubtful that the Supreme Court would go to the extent, in a case directly in point, of holding that this power exists."

The cases mentioned by Mr. Walker do not warrant any doubt as to what the Supreme Court of Illinois would hold upon the question of the power of the city council to fix the price of gas. The most that can be said of the *Rogers Park* case, as an indication of what that court would hold, is that it recognizes the power of the *state*, to be exercised through its legislature or through a *duly authorized* municipality, to fix reasonable water rates; and the *Suburban* case merely adjudges the power of the city to exact a contract from a

[1] Official publication, pp. 320, 322; pamphlet, pp. 44, 46.
[2] Pamphlet, p. 49.

street railway company as a condition to the grant of the original consent. The appellant in the case at bar conceives that it would hardly require the authority of the *Rogers Park* case to reinforce so settled a proposition as that the legislature may, directly or through a duly authorized municipality, regulate gas or water rates when not restrained by constitutional or contractual provisions. And there is no difficulty in conceding the soundness of the established rule that the city could originally have stipulated for a fixed rate as a condition of its consent without in any way affecting the contention that, after the consent had been granted and an immense capital invested on its strength, the city council had no power to change or add to that consent and fix rates or charges in the absence of specific legislative authority. *People* v. *West Division Ry. Co.*, 118 Illinois, 113, 119; *Detroit* v. *Detroit Citizens' St. Ry. Co.*, 184 U. S. 368, 384. But this has nothing whatever to do with the question at bar, *i. e.*, whether such authority has in fact been delegated to the city council of Chicago. Indeed, even if it could be supposed that the effect of the language of the Supreme Court of Illinois in the *Suburban* case on page 606 was to place the question of municipal power in doubt, nevertheless the language is plainly *obiter dictum*, as admitted by Mr. Walker in his opinion, and, as such, is without binding effect either upon a federal or a state court[1], and would still leave the existence of

[1] *Carroll* v. *Lessee of Carroll*, 16 How. 275, 286, 287; *Lockhard* v. *Asher Lumber Co.*, 123 Fed. Rep. 480, 501; *Matz* v. *Chicago & A. R. Co.*, 85 Fed. Rep. 180, 183; *Mayer* v. *Erhardt*, 88 Illinois, 452, 457; *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 574.

this power concededly doubtful. It follows, therefore, in view of the established rule that doubts concerning the existence of power in a municipal corporation are to be resolved against the municipality[1], that Mr. Walker's candid expression of a doubt was equivalent to a denial of the existence of the power. Thus, the Supreme Court of Illinois, in the case of *Laugel* v. *City of Bushnell*, 197 Illinois, 20, 27, decided in June, 1902, since the adoption of the ordinance in question, used the following language:

> "The court [referring to the case of *Emmons* v. *City of Lewistown*, 132 Ill. 380, 384, *supra*], correctly remarked that to concede that it was doubtful whether the legislature had granted such power was to deny the existence of the power."

And in *Seeger* v. *Mueller*, 133 Illinois, 86, the court had said (p. 94):

> "Any fair, reasonable doubt concerning the existence of any power is resolved against the corporation, and the power is denied."

So, in *Interstate Com. Commission* v. *Railway Co.*, 167 U. S. 479, 494, this court in denying that Congress had empowered the Interstate Commerce Commission to fix transportation rates, among other things, said:

> "The question debated is whether it vested in the commission the power and the duty to fix rates; and the fact that this is a debatable ques-

[1] *Minturn* v. *Larue*, 23 How. 435, 436; *Citizens' Street Railway* v. *Detroit Railway*, 171 U. S. 48, 53; Dillon, Municip. Corp., 4th ed. § 89; *Seeger* v. *Mueller*, 133 Illinois, 86, 94; *Emmons* v. *City of Lewistown*, 132 Illinois, 380, 384; *Coquard* v. *Village of Oquawka*, 192 Illinois, 355, 365; *Laugel* v. *City of Bushnell*, 197 Illinois, 20, 27; *Lewisville Natural Gas Co.* v. *State*, 135 Indiana, 49, 51; *Schroeder* v. *Gas & Water Co.*, 20 Pa. Superior Ct. 255, 259.

> tion, and has been most strenuously and earnestly debated, is very persuasive that it did not. The grant of such a power is never to be implied."

And, in *City of Ft. Scott* v. *W. G. Eads Brokerage Co.*, 117 Fed. Rep. 51, 54, the Circuit Court of Appeals for the eighth circuit, Sanborn, C. J., delivering the opinion of the court, among other things, said:

> "Municipal corporations are the creatures of the statutes under which they are organized and operated. By those statutes their powers are granted, measured and limited. Beyond the limits of the powers there expressly granted and those fairly implied therefrom or incident thereto, they cannot lawfully act or agree to act, and a fair and reasonable doubt of the existence of a corporate power is fatal to its being."

Moreover, since the rendition of the opinion of Mr. Walker and the passage of the ordinance in question, the city council has recognized its lack of power by applying to the legislature for express authority to regulate the price of gas. On January 21, 1901, three weeks after the ordinance in question would have gone into effect but for the restraining order of the court below issued in the present case, a special committee of the city council on state legislation reported the draft of an act to be submitted to the legislature, which is printed at length in the pamphlet filed with this brief. This proposed act was submitted to the legislature, but that body declined to pass it. This proof certainly furnishes some evidence that the city regarded itself as without power to fix the price of gas or, at least, that it considered the existence of such power to be doubtful.

The opinions of the corporation counsel of the city

11778

of Chicago are entitled to more weight than the ordinary advice of counsel. His office is created by law, he is the head of the law department of the city, and it is his statutory duty, when called upon, to furnish written opinions for the guidance of the mayor, the city council and every department of the municipal government.[1] Under such circumstances, these opinions, construing a statute relating to the powers of the city, are and ought to be of the highest authority, in the absence of a judicial decision on the exact point. With regard to a doubtful question, as this concededly is, where the authorities charged with the administration of the law have accepted the construction of the corporation counsels as the true one and acquiesced therein for a long period and large property interests have undoubtedly relied upon such action, their conclusions ought to be adopted as resolving the doubt against the existence of power.

In *People* v. *Kipley*, 171 Illinois, 44, 77, an opinion of the corporation counsel of the city of Chicago construing a doubtful statute relating to all other cities in the state as well as Chicago, "for a long series of years unchallenged," was adopted by the Supreme Court of Illinois as the true construction.

So, in *People* v. *Fidelity and Casualty Co.*, 153 Illinois, 25, action by an administrative department of the state of New York upon the advice of its attorney general was accepted as a sufficient showing that the law of New York was in accordance with such action. Mr. Justice

---

[1] Charter of 1863, c. III., § 7, L. 1863, p. 50; City and Village Act, Art. VI., §§ 2, 3, L. 1871–1872, pp. 236, 237; Mun. Ord., 1881, p. 192, 1890, p. 428, 1897, vol. 1, p. 15.

Baker, who delivered the opinion of the court, states the general rule in cases of contemporaneous exposition as follows (p. 39):

> "In construing statutes, the rule that contemporaneous exposition is strongest in the law is to be regarded (*Phœbe* v. *Jay*, Breese, 268; *Isaacs* v. *Steel*, 3 Scam. 97; *Russel* v. *Rumsey*, 35 Ill. 362). Where the execution of statutes is confided to a particular department of the government, the court will regard, and in doubtful cases adopt, the construction acted on by such department (*Mathews* v. *Shores*, 24 Ill. 28; *Isaacs* v. *Steel*, *supra*). And if the construction is doubtful, long continued action upon a particular construction may reduce the uncertainty to a fixed rule. *Comstock* v. *Cover*, 35 Ill. 470."

This is the universal doctrine. It has been frequently applied by this court to contemporaneous expositions by various administrative departments of the federal government. *Potter* v. *Hall*, 189 U. S. 292, 298, 300; *Southern Pacific Railroad Co.* v. *Bell*, 183 U. S. 675, 682, 685; *Hewitt* v. *Schultz*, 180 U. S. 139, 156, 157. The opinions of the attorneys general of the United States have repeatedly been referred to as more or less authoritative in the construction of federal statutes relating to the powers and duties of the federal administrative officers. *Helwig* v. *United States*, 188 U. S. 605, 614–615; *United States* v. *Ranlett and Stone*, 172 U. S. 133, 140; *United States* v. *Wong Kim Ark*, 169 U. S. 649, 692.

B.

Apart, however, from the effect of contemporaneous exposition, which the Supreme Court of Illinois has declared to be "strongest in the law," the existence of

power in the city council of Chicago to fix the price of gas does not exist according to the established rules of statutory construction. These rules, which have heretofore guided the courts in such matters, ought not to be lightly disregarded. As Mr. Justice Bradley so well said in *Merritt* v. *Welsh*, 104 U. S. 694, 702:

> "It is better to submit to a temporary inconvenience than to set the laws all afloat by laying down a canon of construction which leaves the plain words, and seeks to spell out, or guess at, the supposed intent of the legislature, contrary or supplementary to that which is clearly embodied in the words it has used."

An analysis of the City and Village Act of 1872 will show conclusively that the legislature did not intend to delegate to the city council the power to regulate the rates or prices of gas companies. Subdivision eleventh of section 1 of the City and Village Act of 1872, merely grants power to provide for the lighting of streets; subdivision *thirteenth* confers municipal power in general terms to *regulate* the openings in streets for various purposes, and provides for the right to erect gas factories and lay down pipes in the streets or alleys of any city or village "subject to such regulations as any such city or village may by ordinance impose," and subdivision *sixty-sixth* confers municipal power in general terms "to *regulate* the police of the city or village, and pass and enforce all necessary police ordinances."

The scheme of the act of 1872 was to provide a general statute covering the incorporation of cities and villages and dealing in a comprehensive form with the powers to be exercised by them. Certain specific

powers were delegated to the city council in cities, including the power to provide for lighting the streets and opening them for laying of gas or water mains or pipes, and there was granted to any company theretofore or thereafter organized under general laws the right, by consent of the common council, to erect factories and lay down pipes in the streets or alleys of any city subject to such regulations as any city might by ordinance impose.

In *St. Louis* v. *Western Union Telegraph Co.*, 149 U. S. 465, 471, it was pointed out that this power to fix rates was not incident to a power to regulate the use of streets, Mr. Justice Brewer saying:

> "The relation of a telephone or telegraph company to its patrons, after the use of the streets has been granted, does not affect the use, and power to regulate the use does not carry with it by implication power to regulate the dealings between the corporation having such use and its individual patrons."

The statute expressly dealt with the subject of delegating to city councils the power to regulate the rates or charges of those engaged in various businesses, but it omitted any delegation of power to regulate the price or charges of gas. Thus, the express power was delegated to city councils—

1. "To fix the rate of wharfage and dockage" (Art. V, subdiv. 36).
2. "To prescribe the compensation" of hackmen, omnibus drivers "and all others pursuing" like occupations (subdiv. 42).[1]
3. "To establish ferries, toll bridges, and license and regulate the same, and, from time to time, fix tolls thereon" (subdiv. 87).

[1] This has been construed to include street cars. *Union Traction Co.* v. *City of Chicago*, 199 Illinois, 484, 519.

4. "To authorize any person or private corporation to construct and maintain [water works] at such rates as may be fixed by ordinance" (Art. 10, subdiv. 1).

These provisions are found in the same statute of which the provisions now claimed impliedly to authorize the fixing of the price of gas constitute a part.[1] Indeed, they are all subdivisions of the same section which purports to enumerate the powers of cities and villages in the state,[2] except the provision as to waterworks, which will be found in a subsequent article of the same statute.[3]

It, therefore, appears that the legislature was familiar with the terms usually employed in authorizing a municipality to fix rates and charges. Manifestly, if it had intended to confer power to fix the price of gas, it would have done so when the subject of gas was under consideration, by the use of the same exact and simple language deemed by it necessary for that purpose in the case of hackmen, wharves, docks, ferries, toll bridges and waterworks. As Mr. Justice Brewer said, in *Interstate Com. Commission* v. *Railway Co.*, 167 U. S. 479, 495, speaking of the power to regulate rates:

> "The language by which the power is given had been so often used and was so familiar to the legislative mind and is capable of such definite and exact statement, that no just rule of construction would tolerate a grant of such power by mere implication."

It is, therefore, reasonable to assume that the legislature deemed it necessary to confer the power to fix

[1] City and Village Act, L. 1871–1872, p. 218.

[2] § 1 of art. V, subds. 11th, 13th, 16th, 42nd, 66th, 87th, p. 227 *et seq.*

[3] § 1 of art. 10, p. 259.

rates by express words, as it did in the case of hackmen, wharves, docks, ferries, toll bridges, and waterworks, and that its omission of any grant of such power in respect of gas and other public utilities is of conclusive significance, and precisely as if it had declared that it would not grant the power? The case of *City of Cairo* v. *Bross*, 101 Illinois, 475, 478, would seem to be exactly in point. The court, by Mr. Justice Mulkey, there said:

> "When the legislature, by the general incorporation act, declares that the corporate authorities of cities and villages organized and acting under its provisions shall have power to license certain occupations and kinds of business, specifically enumerating them, such declaration must, by a familiar canon of construction, be construed precisely as if the act in express terms inhibited the licensing of all trades and occupations not contained in the enumeration. In discussing this principle, the Supreme Court of the United States, in *Thomas* v. *West Jersey Railroad Co.*, 101 U. S. 82, says: 'Conceding the rule applicable to all statutes, that what is fairly implied is as much granted as what is expressed, it remains that the charter of a corporation is the measure of its powers, and that the enumeration of those powers implies the exclusion of all others.'"

In *C. & N. W. Ry. Co.* v. *City of Chicago*, 148 Illinois, 141, 159, the court quotes with approval the following from Endlich on Interpretation of Statutes, sec. 399:

> "Where there is in the same statute a particular enactment, and also a general one, which, in its most comprehensive sense, would include what is embraced in the former, the particular enactment must be operative, and the general enact ment must be taken to affect only such cases within

its general language as are not within the provisions of the particular enactment."

And in *Kiel* v. *City of Chicago*, 176 Illinois, 137, 140, the court expressly limited one of the very provisions now in question, namely, clause 66, conferring power to pass police ordinances, and said:

> "The powers conferred by the last two clauses are express powers specifically enumerated, and by a familiar canon of construction it will be presumed the act in express terms inhibited the licensing of all trades and occupations not contained in the enumeration. The principle is, that a power may be fairly implied as to police, but where a power is expressly enumerated in the charter of a corporation that is the measure thereof, and the enumeration of such power implies the exclusion of all others. *City of Cairo* v. *Bross*, 101 Ill. 475; *Huesing* v. *City of Rock Island*, 128 *id.* 465. Clause 66, having reference to authority to pass police ordinances, does not extend the express power conferred by the provisions of clause 91."

The point now being discussed arose in *Tacoma Gas & Electric Light Co.* v. *Tacoma*, 14 Washington, 288, as to water and gas regulation, and the principle of construction so firmly established by the Illinois decisions was applied. It was held that no power existed in the municipality to fix the price of gas, the court, by Scott, J., saying (p. 293):

> "It is worthy of note that the legislature thus, in two paragraphs relating to kindred subjects, expressly conferred the power to fix the price of water, and withheld it as to gas or other light, *thus limiting the power over purveyors of gas to 'regulation.'* . . . It is sufficient to say, however, that the legislature having passed a general law upon the particular subject, the power to fix such rates must be found therein, if at all."

So, in *City of St. Louis* v. *Bell Telephone Co.*, 96 Missouri, 623, 632, holding that the general police power to "regulate" telephones and telephone companies, did not include the power to fix maximum telephone rates, the court, by Black, J., said:

> "To say that under this general power the city may fix rates for telephone services would be going entirely too far. *This conclusion is manifest when we consider that the charter points out with particularity those cases in which the city may fix rates and charges.*"

This power over prices does not seem to meet any of the tests of implied powers (Dillon's Mun. Corps., sec. 89, already cited), but is a power which stands by itself, and may be granted or not as the legislature may see fit, being so essentially distinct from other powers that it cannot be granted by implication.

In *City of St. Louis* v. *Bell Telephone Co., supra*, 96 Missouri, 623, 629, the court, by Black, J., said:

> "The city places some reliance on its general power to regulate the use of the streets. This power extends to new uses as they spring into existence from time to time, as well as to uses common and known at the time of the dedication or grant of the power to the municipal corporation. *Ferrenbach* v. *Turner*, 86 Mo. 416. The erection and maintenance of telephone poles is one of these new uses; and is a proper use of the streets. *Julia Building Ass'n* v. *Bell Telephone Co.*, 88 Mo. 258. That the company is subject to reasonable regulations prescribed by the city, as to planting its poles and stringing its wires and the like, is obvious. Such regulations have been obeyed by this defendant.
>
> Conceding all this, we are at a loss to see what this power to regulate the use of the streets has to do with the power to fix telephone

charges. The power to regulate the charges for telephone service is neither included in nor incidental to the power to regulate the use of streets, and the ordinance cannot be upheld on any such ground."

See also *St. Louis* v. *Western Union Telegraph Co.*, 149 U. S. 465, 471, *supra*.

In *State* v. *Sheboygan*, 111 Wisconsin, 23, 38, 39, the court, by Bardeen, J., said:

> "The fixing of maximum charges for use of telephones or service in the city is said to be a lawful police regulation to prevent extortion. This is based upon the assumption that the power of police control possessed by the city is unlimited. Such is not the fact. Such power is inherent in the state, and is a necessary attribute of sovereignty. . . . The power to regulate charges was not included in or incidental to the power to regulate the manner of using streets. There was not the remotest relation between them. The attempt of the city to justify its position on that ground must fail."

So, in the case of *In re Pryor, Petitioner*, 55 Kansas, 724, it was held that a municipality did not have the power to fix maximum gas rates under a general grant of power to regulate, and the court, by Martin, C. J., said (pp. 724, 728, 729):

> "In certain cases the state may fix and regulate the prices of commodities and the compensation for services, but this is a sovereign power, which may not be delegated to cities or subordinate subdivisions of the state, except in express terms or by necessary implication. . . . Under the section of our statute hereinbefore fully quoted, a gas or water company may lay its pipes and mains through the streets of a city only with the consent of the municipal authorities, and *under such regulations as they may prescribe;* but the

regulations are only as to the laying of pipes and mains, and have nothing to do with the price of the gas or water passing through the pipes and supplied to consumers."

In *Old Colony Trust Co.* v. *City of Atlanta*, 83 Fed. Rep. 39 (affirmed 88 Fed. Rep. 859), District Judge Newman said (pp. 43, 44):

> "First, the power of 'regulation' does not necessarily embrace the power to fix rates of charge. There are many matters for it to cover without embracing this latter power. The city unquestionably has the right, within any reasonable limit, to regulate the speed of cars and other matters connected with their movement on the streets; where poles shall be placed in the case of overhead wires; how wires shall be located, and their location with reference to other wires and the safety of the same; and to do many other things which might be noted with reference to the occupancy of the streets, protection to life and limb thereon, and all such matters as involve the safe and orderly use of the streets over which it has, under the legislature, full power and control. . . . We hold, moreover, that, before the city can exercise the power to fix rates of fare for a street-railroad company, it must obtain that power in express terms, or it must arise by necessary implication from the words used in the legislative act. The power of the state over the subject-matter need not be discussed. We are dealing with the power of a municipality, a creature of the legislature, which derives all its authority from the legislature, and can only act within the limits of the legislative grant."

In *Lewisville Natural Gas Co.* v. *State*, 135 Indiana, 49, 52, the court held that a legislative grant of authority to a municipality to provide "regulations for the safe supply, distribution and consumption of natural gas" did not confer power to fix the price of such gas, and unan-

imously overruled the contrary decision in *Rushville* v. *Rushville Natural Gas Co.*, 132 Indiana, 575, 584, rendered the year before by a divided court. In its opinion in the *Lewisville* case, the court quoted the rules of construction for the ascertainment of municipal powers as laid down by Judge Dillon and approved by the Supreme Court of Illinois in numerous cases, and added (p. 52):

> "There is not a word or a syllable to be found in this act indicating that the general assembly had in view any other purpose than that of securing the safe supply and use of natural gas. To secure the safe supply and use of natural gas is one thing, and to fix the price at which gas shall be supplied is another and quite a different thing. In our opinion, it was not the intention of the general assembly to confer, by the act above set out, the power to regulate the price at which natural gas should be furnished. It follows that the conclusion reached in the case of the *City of Rushville* v. *Rushville Natural Gas Co.*, *supra*, was erroneous and should be overruled."

The *Lewisville* case has ever since been followed in Indiana without dissent; and the rule that the power to fix the price of gas is not to be included in a general provision conferring municipal power to regulate is firmly established in that state. *City of Noblesville* v. *Noblesville Gas, etc., Co.*, 157 Indiana, 162, 166; *Muncie Natural Gas Co.* v. *City of Muncie* (Ind. 1903), 66 N. E. 436, 438; *Rushville Nat. Gas Co.* v. *Morristown* (Ind. App. 1903), 66 N. E. 179, 181.

In *Schroeder* v. *Gas & Water Co.*, 20 Pa. Superior Ct. 255 (1902), statutory power of a city "to make ordinances, by-laws, rules and regulations, not inconsistent with the constitution and laws of the common-

wealth, for the maintenance of the peace, good government and welfare of the city, and its trade, commerce and manufactures" (which power was said by the court to be "but a defined statement of the police power of any municipality") was held not to include the power to fix rates for water to be supplied by a water company.

To the same effect are *State ex rel. City of St. Louis* v. *Laclede Gas Light Co.*, 102 Missouri, 472, 486; *Wabaska Electric Co.* v. *City of Wymore*, 60 Nebraska, 199, 202; *Tacoma Gas & Electric Light Co.* v. *Tacoma*, 14 Washington, 288, 293; *Detroit Citizens' St. Ry. Co.* v. *City of Detroit*, 64 Fed. Rep. 628, 639; *Cleveland City Ry. Co.* v. *City of Cleveland*, 94 Fed. Rep. 385, 396. And a diligent search has failed to disclose the decision of any court to the contrary.

The case of *Commonwealth* v. *Gage*, 114 Massachusetts, 328, is not, as the head note may seem to indicate, authority for the proposition that municipal power to fix a maximum fare for the carriage of persons in hackney carriages may be derived from a simple grant of authority contained in the Massachusetts General Statutes, c. 29, § 14, "to make regulations for carriages." An examination of that section together with other authorities cited in the opinion, shows that there could have been no intention of basing the municipal power to fix the rates of hackney coachmen on that provision alone. The power which the city of Boston exercised had been expressly and unequivocally conferred upon it by statute, and this source of its power must have been in the mind of the court when its short opinion was rendered. The statute was probably so familiar to court and counsel that there was no occasion to refer to it at length in the opinion, and

no question as to the sufficiency of municipal authority appears to have been raised or discussed. The section of the General Statutes referred to in the opinion (section 14 of c. 29) expressly recognizes as unimpaired "the right of a city to make by-laws relating to the same subject." The opinion also refers to *Commonwealth* v. *Stodder*, 2 Cush. 562, 574, and *Commonwealth* v. *Duane*, 98 Massachusetts, 1. In the latter case, the existence of sufficient municipal authority was assumed without reference to the statute conferring it. In the former case, however, the authority of the city to regulate hackney coachmen under the statute of 1796, c. 32, is cited, section 6 of which act reads in part as follows:

> "And be it further enacted, that a major part of the selectmen be authorized and empowered to make such rules and regulations, establishing the rates and prices to be paid for the carriage and conveyance of persons in said hackney coaches within the limits of the town of Boston, as they may from time to time judge reasonable, regard being had to the time and distance."

This power of the selectmen was not abrogated by the charter of the city of Boston (Mass. L. 1821, c. 110) enacted pursuant to the second article of amendment to the Massachusetts Constitution, adopted in 1820. On the contrary, section 13 of the charter expressly confirms and reinvests all of the pre-existing powers of the selectmen "in the mayor and aldermen, as hereby constituted, as fully and amply as if the same were herein specifically enumerated." The effect of the city charter was only to change the form, not the powers, of the city government. *Hill* v. *Boston*, 122 Massachusetts, 344, 356.

To avoid misunderstanding, it should be emphasized

that the power here referred to is a power to *regulate* charges, *i. e.*, to establish at any time what they shall be, or what they shall not exceed. This is totally distinct from a power to fix charges as a condition of the grant of the right to occupy or tear up the streets, or to prosecute any business within the municipal limits. Where a municipality has exclusive control over its streets, it may grant rights in them upon such reasonable terms as it may see fit, including a limitation on the charges which the party using the streets may require the public to pay for the services rendered. Such a limitation of charges is merely an exercise of the contractual powers of a municipality, and has nothing whatever to do with its police power, or with any power analogous thereto. *People* v. *Suburban R. R. Co.*, 178 Illinois, 594, 604; *People's Gas Light & Coke Co.* v. *Hale*, 94 Ill. App. 406, 420; *Freeport Water Co.* v. *Freeport City*, 180 U. S. 587, 593, 598; *Decatur Gas Light Co.* v. *City of Decatur*, 120 Illinois, 67, 68.

The decisions in *Union Traction Co.* v. *City of Chicago*, 199 Illinois, 484, and the *Water* cases, so-called (*City of Danville* v. *Danville Water Co.*, 178 Illinois, 299; 180 Illinois, 235; 186 Illinois, 326; 180 U. S. 619; *Rogers Park Water Co.* v. *Fergus*, 178 Illinois, 571; 180 U. S. 624; *Freeport Water Co.* v. *Freeport*, 186 Illinois, 179; 180 U. S. 587), which will probably be relied on by counsel for the city as opposed to the contention of the appellants, in reality tend most strongly to sustain it. In the *Traction* case, it was held that two subdivisions of the same section of the City and Village Act conferring power (*forty-second*) " to license, tax and *regulate* hackmen, draymen,

omnibus drivers, carters, cabmen, porters, expressmen, and all others pursuing like occupations, *and to prescribe their compensation*," and (*ninety-sixth*) " to pass all ordinances, rules, and make all regulations proper or necessary to carry into effect the powers granted," conferred authority to fix maximum street car fares. A careful consideration of the statutory provisions involved in that case will show that the legislature fully understood the limited scope of a general municipal power to *regulate* and clearly expressed its intention that such power should have only limited scope and should not include power to fix maximum charges. This is apparent when it is appreciated that, after conferring the general powers " to license, tax and *regulate*," the legislature, in order to confer power to fix maximum charges, deemed it necessary to add the words, *and to prescribe their compensation.*

In the *Water* cases, it was held, among other things, that section 1 of article 10 of the City and Village Act (1 Starr & Curt. Ann. Stat., 2d ed., p. 786) conferring municipal power " to authorize any person or private corporation to construct and maintain the same [water works] *at such rates as may be fixed by ordinance*, and for a period not exceeding thirty years," was sufficient to authorize the fixing of maximum water rates by various municipalities throughout the state. The decision on this point in each case was based solely upon the plain expression, " such *rates* as may be fixed by ordinance," certainly not upon any implication from the general power to regulate water works and water companies or to pass and enforce police ordinances found elsewhere in the same statute. 178 Illinois, 311–312; 180 U. S. 587, 593, 601.

Not only has the legislature thus by conferring power to fix rates other than gas rates expressed its intention to withhold the power to fix gas rates, but it has even more directly expressed that intention by its special action on the subject of gas rates.

The act of February 7, 1865 (1 Pr. L. 1865, pp. 589, 590), amending the charter of the People's Company, contained the following provision (record, pp. 27, 28):

> "But ten years after the passage of this act the common council of the city of Chicago may, by resolution or ordinance, regulate the prices charged by said company for gas; but said common council of the city of Chicago shall, in no case, be authorized to compel the said company to furnish gas at a less rate than three dollars per thousand feet."

This is a plain statement of the legislative will as to the extent of the power of the city council to regulate the gas rates of the People's Company; that is, it was given the power to regulate such rates above three dollars per thousand feet, but below that price the city was to have no power of regulation as to rates. And in the so-called Consolidation Act of 1897 the legislature prescribed not only the price to be charged by the consolidated corporation but the quality of the gas.

This special legislation having particular application to the subject of gas rates is not in any way repugnant to the general provisions of the City and Village Act of 1872, and should, therefore, control. In the present case, as we have seen, every reasonable hypothesis would exclude from the general powers of regulation the power to regulate gas rates. And yet, to hold that these general provisions conferred power to fix the price of gas at seventy-five cents per thousand

feet would necessarily involve a holding that the prior special grant of power to regulate gas rates above but not below three dollars per thousand feet was in some way impliedly repealed and that the subsequent enactment in 1897 was subject to nullification by action of a city council. Such a holding would be contrary to the plainest principles of statutory construction and directly at variance with repeated decisions of the Supreme Court of Illinois.

In *City of East St. Louis* v. *Maxwell*, 99 Illinois, 439, 444, the court, referring to the effect of the City and Village Act, said:

> "The act of 1872 is a statute of a general nature, and such statutes do not repeal, by implication, charters and special acts passed for the benefit of particular municipalities. Dillon on Municipal Corporations, sec. 54."

And in *Village of Hyde Park* v. *Oakwoods Cemetery Asso.*, 119 Illinois, 141, 148, the court said:

> "The act conferring the powers on the association was special, and under the rule announced, was not abrogated by the general law. The act of 1872 confers general power to lay out and vacate roads and streets, on cities and villages, within their corporate limits; but within the village of Hyde Park, by special act, the association had previously been authorized to acquire certain lands for a public purpose, and such lands, by the terms of the act, were not liable to be taken for road purposes. The two acts may stand together."

To the same effect, see *People* v. *Murphy*, 202 Illinois, 493, 496; *People* v. *Brown*, 189 Illinois, 619, 622; *Village of Ridgway* v. *Gallatin County*, 181 Illinois, 521, 526; *Trausch* v. *County of Cook*, 147 Illinois, 534, 537; *Gunnarssohn* v. *City of Sterling*, 92 Illinois, 569, 573; *Cov-*

ington v. *City of East St. Louis*, 78 Illinois, 548, 553; *Town of Ottawa* v. *County of La Salle*, 12 Illinois, 339, 341.

In any event, the *thirteenth* subdivision was not intended to authorize a regulation applicable to the People's Company, for that company was organized and exists under and by virtue of special acts, whereas the application of the provision in question to companies then existing is expressly confined to companies "organized under the *general* laws." The most that can be said of the power of regulation granted by this *thirteenth* subdivision is that "the right, by consent of the common council (subject to existing rights), to erect gas factories, and lay down pipes in the streets or alleys" therein conferred upon companies theretofore "organized under the general laws of this state" should be subject to "such regulations as any such city or village may by ordinance impose." Such a power of regulation must clearly be confined to the subject matter of that clause.

C.

There only remains to consider the provision of the *sixty-sixth* subdivision of section 1 of article V of the act of 1872, which reads as follows:

> "To regulate the police of the city or village, and pass and enforce all necessary police ordinances."

It would surely be an extraordinary stretch of language to hold that this general grant to the city council of power to regulate the police of a city and to pass and enforce necessary police ordinances was intended by the

legislature to invest the city council with the governmental power of regulating rates. The statute does not delegate to the city council general police power but simply power to pass and enforce 'necessary police ordinances.' There must needs be a vast difference between a grant of power to regulate the police of a city or village and to pass police ordinances and a delegation of the 'police power' of a state. Speaking of the latter, Mr. Justice Harlan said, in *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650, 661: "In its broadest sense, as sometimes defined, it includes all legislation and almost every function of civil government."

The consequence of now holding that a grant of power to pass and enforce all necessary police ordinances covered a power to regulate the price of gas, water, telephones, electric lights, warehousemen, etc., etc., would be a great deal more than merely sustaining this particular ordinance. It would necessarily involve holding that the provision quoted was intended to grant to the smallest village as well as to the largest city unlimited police power, as absolute as that of the state itself according to the broadest view of police power that has ever been taken; for, if the phrase 'necessary police ordinances' covers the regulation of the price of gas, it must also cover not merely the regulation of prices for all other public services, but the regulation of all other acts except those relating to taxation and finance. In fact, if clause 66 could receive the interpretation now contended for by the city, all but four or five of the other ninety-five clauses in article V would be superfluous. In order

to sustain the city's contention, a rule of statutory construction hitherto unknown in jurisprudence must be formulated and declared.

It must be clearly evident to the court, as the only reasonable and true construction, that the legislature simply intended to confer upon the municipalities of the state the power to regulate their local police and to pass such necessary police ordinances as were appropriate or adequate to protect the public morals, the public health and the public safety and to promote the good order and peace of the community.[1]

The saying is, indeed, trite that most of the confusion in the law results from the use of inappropriate or indefinite terminology. It would obviously tend to avoid much confusion if the term, 'police power' were confined and limited to those restraints upon private rights and liberties or to those punishments which the morals, health, or peace of the community may require, and if other legislative enactments, such as the regulation of the rates of public carriers, warehousemen and those engaged in more or less public occupations, were embraced within the term 'general governmental or legislative powers.' Rules observed by the courts in construing statutes relating to public health, morals, or peace, have no application whatever to many statutes relating to the use of property, the carrying on of trade or business, etc. For example, it has been repeatedly held that the right to exercise the police power cannot be

[1] 4 Blackstone Com. 162; Bentham's General View of Public Offenses (Edinborough ed. of Works, Part IX, p. 157); *Wilkie* v. *City of Chicago*, 188 Illinois, 444, 450–451; *Wice* v. *C. & N. W. Ry. Co.*, 193 Illinois, 351, 353.

11788

parted with by the legislature because "no legislature can bargain away the public health or the public morals."[1] Yet, a legislature could clearly grant to a railroad, gas, or water company the right to charge fixed rates, and such a grant, duly accepted and based on consideration, would be held to be a contract protected by the Federal Constitution. Nevertheless, it is suggested, as we have seen above, that such a grant would be a bargaining away of the police power, because the right to regulate charges has been said to be embraced within the police power. Many other examples might be given to illustrate that the loose use of the term 'police power' is misleading, that this term should be confined to statutes or regulations affecting the public health, morals, or safety, and that other subjects of legislation, such as the regulation of rates, should be recognized as coming within the scope of those general governmental powers which are inherent in the legislative branch of our form of republican government. A classification of this kind would simplify the consideration of many cases, and would avoid much apparent conflict. Rules which are wise and necessary in construing police power in the narrower sense indicated, would then be recognized at once to be not at all applicable to the discussion of other governmental powers.

Professor Thayer, in a note to his work "Cases on Constitutional Law," part II, 693, comments on the misuse of the term 'police power,' and, among other things, says:

> "Discussions of what is called the 'police power' are often uninstructive, from a lack of

[1] *Stone* v. *Mississippi*, 101 U. S. 814, 819.

> discrimination. It is common to recognize that the subject is hardly susceptible of definition, but very often, indeed, it is not perceived that the real question in hand is that grave, difficult, and fundamental matter,—what are the limits of legislative power in general? . . . But often, the discussion turns upon the true limits and scope of legislative power in general,—in whatever way it may seek to promote the general welfare."

So, also, in *Lake Shore & Mich. South. Railway* v. *Ohio*, 173 U. S. 285, 297, Mr. Justice Harlan said:

> "It may be that such legislation is not within the 'police power' of a state, as those words have been sometimes, although inaccurately, used. But in our opinion the power, whether called police, governmental or legislative, exists in each state, by appropriate enactments not forbidden by its own constitution or by the Constitution of the United States, to regulate the relative rights and duties of all persons and corporations within its jurisdiction, and therefore to provide for the public convenience and the public good."

And in the late case of *Knoxville Water Co.* v. *Knoxville*, 189 U. S. 434, 437, Mr. Justice Holmes, delivering the opinion of the court, said that it was "unnecessary to consider whether the regulation of water rates is properly to be classed as a police power."

The court has not yet been called upon to differentiate 'police powers' from 'general governmental powers,' but it cannot be doubted that when an appropriate case requires it to pass upon the subject, it will make the distinction and point out that the term 'police power' should be confined to the narrower sense which we have indicated.

But the police power of a municipality is clearly something very much more limited than that of a state:

A municipality has no powers inherent in sovereignty. Its police power is just as strictly limited by its charter as is any of its other powers. In fact, the broader the view taken of the inherent police power of a state, the more strikingly it contrasts with the limited and derivative police power of a municipality. No state, it is safe to say, has ever made any general grant to any municipality of such police power as the state itself possesses, to be exercised, within the corporate limits, as fully as the state could exercise it. On the contrary, such police power as is granted is always a restricted power, in some states broader and in others narrower, but always limited to what the legislature may regard as the needs of the municipality and its inhabitants. Hence Judge Dillon, in referring to municipal police power in general, does not treat it as a comprehensive power, granted as such, but merely as the aggregate of such particular powers as the legislature has seen fit to grant in regard to matters of police. He says: "Many of the powers exercised by municipalities fall within what is known as the *police power* of the state, and are delegated to them to be exercised for the public good. Of this nature is the authority to suppress nuisances, preserve health, prevent fires, to regulate the use and storing of dangerous articles, to establish and control markets, and the like." (Dillon's Mun. Corps., sec. 141.)

In *Wilkie* v. *Chicago*, 188 Illinois, 444, 450, the city had passed an ordinance requiring each master plumber to pay a license fee of thirty dollars a year and imposing penalties for performing any plumbing work without taking out such license. The legislature had also pre-

scribed certain conditions upon which plumbers might exercise their calling. A bill was filed to enjoin the enforcement of the ordinance, and the Supreme Court said:

> "A city has no inherent power to license any occupation or to exact a license fee from any person. The power to do so must be found in its charter, and it must be either expressly given or be a necessary incident to the carrying out of a power so granted. The power must be plainly and unmistakably authorized by the legislature. In this case, the power to enact sections 1415 and 1421 is claimed by virtue of clause 66 of section 1 of article 5 of the act for the incorporation of cities and villages, which gives the city council power 'to regulate the police of the city or village, and pass and enforce all necessary police ordinances,' and clause 78 of the same section, which authorizes the council 'to do all acts, make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease.' If a city council attempts to exercise the powers so conferred, it is, of course, necessary that there should be some substantial relation between the means employed and the end authorized by the charter. *An ordinance passed in fulfillment of the objects embraced within the provisions in question must have some tendency to promote the public health, morals, security, comfort and welfare or to suppress disease.* So far as this record shows, there was no connection whatever between the ordaining by the city council of sections 1415 and 1421 and the police power or the promotion of health or the suppression of disease. The bill to which the demurrer was interposed sets out the sections already quoted, and they are the only ones before us. The requirement of a license, with the exaction of a license fee, may be a proper and convenient means of regulating the business, but if there was any provision of the ordinance, in con-

nection with the license under section 1415, designed to promote health or suppress disease, or coming within the exercise of the police power, it does not appear. Manifestly, it does not improve the health of the public or suppress disease to collect $30 from a plumber.

There is no more relation between the public health and the collection of $30 from a person engaged in plumbing than there would be from a person engaged in any other business or occupation which in no way affects the public health. So far as the record shows, the city has done nothing except make a demand for $30 per year from each plumber, and there is not a trace of regulation for the public health or comfort or suppression of disease in the provision. As a mere exaction of money could not have the slightest tendency toward the ends contemplated by the clauses of the charter relied upon, the demurrer could not be sustained on the ground that such exaction was an exercise of the powers conferred by such clauses. The city has no power to tax the occupation of plumber, and does not claim to have such power."

This case is particularly instructive, because it demonstrates that the power to pass police ordinances is always confined within narrow limits and does not include the governmental power to regulate rates or license occupations. Otherwise, the court would have held that the power to pass police ordinances, if commensurate with what is usually the 'police power' of the state, would necessarily have included the power to license plumbers or any other occupation.

So, also, the power granted by the City and Village Act to enact and enforce all necessary police ordinances (the very power under which the ordinance now in question was attempted to be passed) was held in the case of *Wice* v. *C. & N. W. Ry. Co.*, 193 Illinois, 351, 353, not

to authorize an ordinance forbidding passengers from getting on or off trains in motion, unless permitted by those in charge, a regulation which no one would doubt was within the police power of the legislature. In that case, the court said:

> "Clause 66 of paragraph 62, article 5, of the act for the incorporation of cities and villages, provides that the city council shall have power 'to regulate the police of the city and pass and enforce all necessary police ordinances.' This is the provision of the statute relied on as conferring power on the city to pass the ordinance, and it can be sustained, if at all, only under the police power conferred on the city by this provision of its charter. In *Culver* v. *City of Streator*, 130 Ill. 238, in defining the police power, we said (p. 243): 'That power may be defined, in general terms, as comprehending the making and enforcement of all such laws, ordinances and regulations as pertain to the comfort, safety, health, convenience, good order and welfare of the public.' This definition is certainly broad enough to cover all the power the city had to pass the ordinance. The provision of the general incorporation act is a delegation by the general assembly to the city of Chicago of police power to pass and enforce all necessary police ordinances—that is ordinances necessary for the comfort, safety, health, convenience, good order and welfare of its inhabitants. . . . It is difficult to conceive of the necessity, as a police regulation, for such an ordinance, and it is only necessary police ordinances that the city is authorized to pass. True, by the word 'necessary,' 'indispensable' was not meant, but only such ordinances as would be conducive to, or beneficial or effective in, the promotion of the comfort, safety, health, convenience, good order, or general welfare of the municipal public."

See also *Kiel* v. *City of Chicago*, 176 Illinois, 137, 141; *Huesing* v. *City of Rock Island*, 128 Illinois, 465, 477.

Illustrations such as the above might be multiplied, but it must be sufficiently clear that the police powers of municipal corporations are not unlimited, and that no attempt to exercise municipal police powers can be upheld by a court unless it be clearly shown to have been authorized by the legislature.

In *State* v. *Sheboygan*, 111 Wisconsin, 23, it was contended that the fixing of maximum charges for the use of telephones in the city was a lawful police regulation to prevent extortion. The court said (p. 38):

> "This [contention] is based upon the assumption that the power of police control possessed by the city is unlimited. Such is not the fact. *Such power* is inherent in the state, and is a necessary attribute of sovereignty. It does not pass to the minor divisions of government except by express grant or by necessary implication from other powers granted."

So, in *In re Pryor, Petitioner*, 55 Kansas, 724, 728, it was said:

> "In certain cases the state may fix and regulate the prices of commodities and the compensation for services, but this is *a sovereign power*, which may not be delegated to cities or subordinate subdivisions of the state, except in express terms or by necessary implication."

It may even be questioned whether the words "or by necessary implication" do not go too far. No instance of any grant of such a power by implication was referred to, and none has been found after the most painstaking research.

Upon this branch of the case, it need only be added that if the language of clause 66 above quoted is so comprehensive as to include all the police powers which the legislature itself, as the sovereign legislative

body, could exercise, most of the cases decided in Illinois in limitation of the powers of municipal corporations were entirely erroneous. The cases cited from the courts of Illinois, holding that particular powers did not exist in municipalities, related to matters which were clearly within the general police power of a legislature, if we use that term in its broadest sense. In each case, the power existed, as it exists in almost every municipality in the country, to adopt police ordinances, but until very recently the view has never been seriously advanced that the grant of the power to regulate the police of a city or village and to pass police ordinances was commensurate with the governmental police power of the state itself.

Conclusion.

For the foregoing reasons, it is submitted that the decree of the court below should be reversed.

William D. Guthrie,
James F. Meagher,
William F. Sheehan,
Of counsel for appellant.

Washington, January 8, 1904.

FILE COPY. 11792

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 132.

Office Supreme Court U. S.
FILED
JAN 12 1904
JAMES H. McKENNEY,
Clerk.

THE PEOPLE'S GAS LIGHT AND COKE COMPANY,
Appellant,

vs.

THE CITY OF CHICAGO.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

STATUTES, ORDINANCES, ETC.

	PAGE
Original charter, February 12, 1855 (record, p. 26; L. of Ill. 1855, p. 614)	1
Ordinance granting consent to lay pipes, August 30, 1858 (record, p. 29)	3
Amendment to charter, February 7, 1865 (record, p. 27; 1 Pr. L. of Ill. 1865, p. 589)	5
Powers of city council, enumerated in the City and Village Act, April 10, 1872, in force, July 1, 1872 (L. of Ill. 1871-1872, pp. 227-234, 259, amended, L. of Ill. 1887, p. 109; 1 Starr & C. Ann. Stat., 2d ed., p. 689)	7
Statutes in pari materia	19
Consolidation or Merger Act, June 5, 1897, in force July 1, 1897 (L. of Ill. 1897, p. 177)	21
Ordinance of October 15, 1900, fixing price of gas, in force January 2, 1901, (record, p. 78)	28
Proposed Act prepared after passage of ordinance by city council of Chicago for submission to Illinois legislature	30
Opinions Chicago Corporation Counsel, 1881-1899	31
Opinion in recent quo warranto proceedings, People ex rel. Deneen v. People's Gas Light and Coke Company	52

ORIGINAL CHARTER, FEBRUARY 12, 1855.

(Record, p. 26; L. of Ill. 1855, p. 614.)

AN ACT TO INCORPORATE THE PEOPLE'S GAS LIGHT AND COKE COMPANY.

SECTION 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly,* That Matthew Laflin, L. C. Paine Freer, A. G. Throop, D. A. Gage, John S. Wallace, George W. Snow, H. B. Bay and R. H. Foss and their associates be and they are hereby created a body politic and corporate, with perpetual succession, by the name and style of "The People's Gas Light and Coke Company," and by that name they and their successors shall be capable in law of contracting and being contracted with, suing and being sued, defending and being defended in all courts and places and in all matters and places whatsoever, with full powers to acquire, hold, occupy and enjoy all such real and personal estate as may be necessary and proper for the construction, extension and usefulness of the works of said company, and for the management and good government of the same; and they may have a common seal, and the same may alter, break and renew at pleasure.

§ 2. The corporation hereby created shall have full power and authority, forthwith upon their due organization under this act, to proceed to the erection of the necessary works for the manufacture of gas and coke, within said city of Chicago, and on and after the 12th day of February, A. D. 1859, to manufacture and sell gas, to be made from any or all the substances or a combination thereof, from which

inflammable gas is usually obtained, and to be used for the purpose of lighting the city of Chicago or the streets thereof and any buildings, manufactories, public places or houses therein contained, and to erect all necessary works and apparatus as aforesaid; and on and after the said 12th day of February, 1859, or sooner by and with the consent of the Chicago Gas Light and Coke Company, to lay pipes for the purpose of conducting the gas in any of the streets or avenues of said city, with the consent of the city council: *Provided*, that no permanent injury or damage shall be done to any street, lane or highway in said city. The real estate which this corporation is entitled to hold shall not exceed in value one hundred thousand dollars.

§ 3. The capital stock of said company shall not exceed five hundred thousand dollars, to be subscribed for and paid in such proportions as shall be prescribed by the by-laws and rules for regulating the concerns of said company as they shall think proper and necessary respecting the management and disposition of the stock, property and estate of said company, the duties of the officers and agents to be employed, the number and election of directors, and all such matters as appertain to the concerns of said company.

§ 4. It is an express provision of the foregoing act of incorporation that the said company shall furnish and supply to the city of Chicago, for all its public uses, at the election of the proper authorities of said city, a sufficient supply of gas, at a rate not exceeding two dollars per thousand feet, and the inhabitants of said city, at a rate not exceeding two dollars and fifty cents per thousand feet.

ORDINANCE GRANTING CONSENT TO LAY PIPES, AUGUST 30, 1858.

(Record, p. 29.)

AN ORDINANCE CONCERNING THE PEOPLE'S GAS LIGHT AND COKE COMPANY.

Be it ordained by the common council of the city of Chicago:

SECTION 1. That permission and authority be, and the same are hereby granted to The People's Gas Light and Coke Company, of the city of Chicago, and State of Illinois, to lay their gas mains, pipes, feeders and service pipes in any of the streets, avenues, highways, public parks or squares throughout said city subject at all times, however, to the resolutions and ordinances of the common council of said city: *Provided*, that said company when they shall open the ground to lay any pipe, or for any other purposes whatever, they shall restore the streets, pavements and sidewalks to a condition satisfactory to the city superintendent, with all convenient dispatch, and no more of any street or alley shall be opened or encumbered at any one time or in any one place, nor shall any street or alley be suffered to remain open or encumbered for a longer period than shall be strictly necessary to enable said company to proceed with their work; and said company shall be liable for all damages which may result from, or by reason of, opening or encumbering any street, alley or sidewalk in said city of Chicago, and *provided further*, that whenever said company shall desire to lay their pipe, or do other work in any of the principal streets of said city, before they commence doing so they shall consult the mayor or city superintendent of public works, and unless the mayor or superintendent consent to such work being done at the particular time, they shall not

proceed with such work on any such principal street, without the express permission of the common council of the said city of Chicago; and *provided, further*, that nothing herein contained shall be construed to conflict with any rights or privileges heretofore given by the common council to the Chicago Gas Light and Coke Company, or in conflict with the provisions contained in the act of incorporation of the People's Gas Light and Coke Company, to first obtain the consent of the Chicago Gas Light and Coke Company, if pipes are laid previous to February 12, A. D. 1859.

AMENDMENT TO CHARTER, FEBRUARY 7, 1865.

(Record, p. 27; 1 Pr. L. of Ill. 1865, p. 589.)

AN ACT TO AMEND AN ACT ENTITLED "AN ACT TO INCORPORATE THE PEOPLE'S GAS LIGHT AND COKE COMPANY," APPROVED FEBRUARY 12, 1855.

SECTION 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly,* That the second section of said act be and the same is hereby so amended as to read as follows, viz: The corporation hereby created shall have full power and authority forthwith to proceed to the erection and maintenance of the necessary works for the manufacture of gas and coke within said city of Chicago, and to manufacture, supply and sell gas, to be made from any and all substances or a combination thereof, from which inflammable gas is usually obtained, and to be used for the purpose of lighting the city of Chicago, any streets, buildings, manufactories, public places or houses therein contained, and to erect and use all necessary works and apparatus for such purposes aforesaid, and with the consent of the common council of said city, to lay down and use all necessary pipes for the conducting of gas in and along any of the streets, alleys, avenues or public squares of said city: *Provided*, that no permanent injury or damage shall be done to any such street, alley, avenue or public square by the laying down of any such pipes.

§ 2. That section three of the said act be and the same is hereby so amended as to read as follows, viz: The capital stock of said company shall be five hundred thousand dollars, and may be increased from time to time, at the pleasure of said corporation; it may be divided into such shares, subscribed for, paid and transferred in such proportions and

manner as shall be prescribed by the by-laws and regulations of said company.

§ 3. All the corporate powers of said corporation shall be vested in and exercised by a board of directors, and such officers and agents as said board shall appoint. The board of directors shall consist of not less than three nor more than five stockholders, who shall be chosen by the stockholders at such time and in such manner as the said corporation shall by its by-laws prescribe, and shall hold their office until their successors are elected and qualified, and may fill any vacancies which may happen in the board of directors by death, resignation or otherwise; they may adopt such by-laws, rules and regulations for the government of said corporation and the management of its affairs and business as they may think proper, not inconsistent with the laws of this state, and the fourth section of said act is hereby repealed; but ten years after the passage of this act the common council of the city of Chicago may, by resolution or ordinance, regulate the prices charged by said company for gas; but said common council of the city of Chicago, shall, in no case, be authorized to compel the said company to furnish gas at a less rate than three dollars per thousand feet.

§ 4. The said corporation is hereby authorized to borrow money and to mortgage or lease any of its property or franchises.

§ 5. This act shall be deemed a public act, and noticed as such by all courts without pleading, and take effect from and after its passage.

POWERS OF CITY COUNCIL, ENUMERATED IN THE CITY AND VILLAGE ACT, APRIL 10, 1872, IN FORCE JULY 1, 1872.

(L. of Ill. 1871–1872, pp. 227–234, 259; amended, L. of Ill. 1887, p. 108[1]; 1 Starr & C. Ann. Stat., 2d ed., p. 689.)

AN ACT TO PROVIDE FOR THE INCORPORATION OF CITIES AND VILLAGES.

ARTICLE V.

OF THE POWERS OF THE CITY COUNCIL.

SECTION 1. The city council in cities, and president and the board of trustees in villages, shall have the following powers:

First—To control the finances and property of the corporation.

Second—To appropriate money for corporate purposes only, and provide for payment of debts and expenses of the corporation.

Third—To levy and collect taxes for general and special purposes on real and personal property.

Fourth—To fix the amount, terms and manner of issuing and revoking licenses.

Fifth—To borrow money on the credit of the corporation for corporate purposes, and issue bonds therefor, in such amounts and form and on such conditions as it shall prescribe, but shall not become indebted in any manner or for any purpose to an amount, including existing indebtedness, in the aggregate to exceed five (5) per centum on the value of the taxable property therein, to be ascertained by the last assessment for the State and county taxes previous to the incurring of such indebtedness; and before or at the time of incurring any indebtedness, shall provide for the collection of a direct annual tax, sufficient to pay the interest on such debt as it falls due, and also to pay and discharge the principal thereof within twenty years after contracting the same.

Sixth—To issue bonds in place of or to supply means to meet maturing bonds, or for the consolidation or funding of the same.

[1] The only amendment of article V, section 1, as originally enacted, consists of additions to subdivision *Ninetieth*, *infra*, p. 16.

Seventh—To lay out, to establish, open, alter, widen, extend, grade, pave or otherwise improve streets, alleys, avenues, sidewalks, wharves, parks and public grounds, and vacate the same.

Eighth—To plant trees upon the same.

Ninth—To regulate the use of the same.

Tenth—To prevent and remove encroachments or obstructions upon the same.

Eleventh—To provide for the lighting of the same.

Twelfth—To provide for the cleansing of the same.

Thirteenth—To regulate the openings therein for the laying of gas or water mains and pipes, and the building and repairing of sewers, tunnels and drains, and erecting gas lights: *Provided, however*, that any company heretofore organized under the general laws of this State, or any association of persons organized, or which may be hereafter organized for the purpose of manufacturing illuminating gas to supply cities or villages, or the inhabitants thereof, with the same, shall have the right, by consent of the common council (subject to existing rights), to erect gas factories, and lay down pipes in the streets or alleys of any city or village in this State, subject to such regulations as any such city or village may by ordinance impose.

Fourteenth—To regulate the use of sidewalks and all structures thereunder; and to require the owner or occupant of any premises to keep the sidewalks in front of, or along the same, free from snow and other obstructions.

Fifteenth—To regulate and prevent the throwing or depositing of ashes, offal, dirt, garbage or any offensive matter in, and to prevent injury to any street, avenue, alley or public ground.

Sixteenth—To provide for and regulate crosswalks, curbs and gutters.

Seventeenth—To regulate and prevent the use of streets, sidewalks and public grounds for signs, sign-posts, awnings, awning posts, telegraph poles, horse troughs, racks, posting handbills and advertisements.

Eighteenth—To regulate and prohibit the exhibition or carrying of banners, placards, advertisements or handbills in the streets or public grounds, or upon the sidewalks.

Nineteenth—To regulate and prevent the flying of flags, banners or signs across the streets or from houses.

Twentieth—To regulate traffic and sales upon the streets, sidewalks and public places.

Twenty-first—To regulate the speed of horses and other animals, vehicles, cars and locomotives within the limits of the corporation.

Twenty-second—To regulate the numbering of houses and lots.

Twenty-third—To name and change the name of any street, avenue, alley or other public place.

Twenty-fourth—To permit, regulate or prohibit the locating, constructing or laying a track of any horse railroad in any street, alley or public place; but such permission shall not be for a longer time than twenty years.

Twenty-fifth—To provide for and change the location, grade and crossings of any railroad.

Twenty-sixth—To require railroad companies to fence their respective railroads, or any portion of the same, and to construct cattle guards, crossings of streets and public roads, and keep the same in repair, within the limits of the corporation. In case any railroad company shall fail to comply with any such ordinance, it shall be liable for all damages the owner of any cattle or horses or other domestic animal, may sustain by reason of injuries thereto while on the track of such railroad, in like manner and extent as under the general laws of this State, relative to the fencing of railroads; and actions to recover such damages may be instituted before any justice of the peace or other court of competent jurisdiction.

Twenty-seventh—To require railroad companies to keep flagmen at railroad crossings of streets, and provide protection against injury to persons and

property in the use of such railroads. To compel such railroads to raise or lower their railroad tracks to conform to any grade which may at any time, be established by such city, and where such tracks run lengthwise of any such street, alley or highway, to keep their railroad tracks on a level with the street surface, and so that such tracks may be crossed at any place on such street, alley or highway. To compel and require railroad companies to make and keep open, and to keep in repair, ditches, drains, sewers and culverts along and under their railroad tracks, so that filthy or stagnant pools of water cannot stand on their grounds or right of way, and so that the natural drainage of adjacent property shall not be impeded.

Twenty-eighth—To construct and keep in repair bridges, viaducts and tunnels, and to regulate the use thereof.

Twenty-ninth—To construct and keep in repair culverts, drains, sewers and cesspools, and to regulate the use thereof.

Thirtieth—To deepen, widen, dock, cover, wall, alter or change the channel of water courses.

Thirty-first—To construct and keep in repair canals and slips for the accommodation of commerce.

Thirty-second—To erect and keep in repair public landing places, wharves, docks and levees.

Thirty-third—To regulate and control the use of public and private landing places, wharves, docks and levees.

Thirty-fourth—To control and regulate the anchorage, moorage and landing of all water craft and their cargoes within the jurisdiction of the corporation.

Thirty-fifth—To license, regulate and prohibit wharf-boats, tugs and other boats used about the harbor, or within such jurisdiction.

Thirty-sixth—To fix the rate of wharfage and dockage.

Thirty-seventh—To collect wharfage and dock-

age from all boats, rafts or other craft landing at or using any public landing place, wharf, dock or levee within the limits of the corporation.

Thirty-eighth—To make regulations in regard to use of harbors, towing of vessels, opening and passing of bridges.

Thirty-ninth—To appoint harbor masters and define their duties.

Fortieth—To provide for the cleansing and purification of waters, water courses and canals, and the draining or filling of ponds on private property, whenever necessary to prevent or abate nuisances.

Forty-first—To license, tax, regulate, suppress and prohibit hawkers, peddlers, pawnbrokers, keepers of ordinaries, theatricals and other exhibitions, shows and amusements, and to revoke such license at pleasure.

Forty-second—To license, tax and regulate hackmen, draymen, omnibus drivers, carters, cabmen, porters, expressmen, and all others pursuing like occupations, and to prescribe their compensation.

Forty-third—To license, regulate, tax and restrain runners for stages, cars, public houses, or other things or persons.

Forty-fourth—To license, regulate, tax or prohibit and suppress billiard, bagatelle, pigeon hole or any other tables or implements kept or used for a similar purpose in any place of public resort, pin alleys and ball alleys.

Forty-fifth—To suppress bawdy and disorderly houses, houses of ill fame or assignation, within the limits of the city, and within three miles of the outer boundaries of the city; and also to suppress gaming and gambling houses, lotteries, and all fraudulent devices and practices, for the purpose of gaming or obtaining money or property; and to prohibit the sale or exhibition of obscene or immoral publications, prints, pictures or illustrations.

Forty-sixth—To license, regulate and prohibit the selling or giving away of any intoxicating, malt, vinous, mixed or fermented liquor,

the license not to extend beyond the municipal year in which it shall be granted, and to determine the amount to be paid for such license: *Provided*, that the city council in cities, or president and board of trustees in villages, may grant permits to druggists for the sale of liquors for medicinal, mechanical, sacramental and chemical purposes only, subject to forfeiture, and under such restrictions and regulations as may be provided by ordinance: *Provided, further*, that in granting licenses, such corporate authorities shall comply with whatever general law of the state may be in force relative to the granting of licenses.

Forty-seventh—The foregoing shall not be construed to affect the provisions of the charter of any literary institution heretofore granted.

Forty-eighth—And the city council in cities, and president and board of trustees in villages, shall also have the power to forbid and punish the selling or giving away of any intoxicating, malt, vinous, mixed or fermented liquor to any minor, apprentice or servant, or insane, idiotic or distracted person, habitual drunkard, or person intoxicated.

Forty-ninth—To establish markets and market houses, and provide for the regulation and use thereof.

Fiftieth—To regulate the sale of meats, poultry, fish, butter, cheese, lard, vegetables, and all other provisions, and to provide for place and manner of selling the same.

Fifty-first—To prevent and punish forestalling and regrating.

Fifty-second—To regulate the sale of bread in the city or village; prescribe the weight and quality of the bread in the loaf.

Fifty-third—To provide for and regulate the inspection of meats, poultry, fish, butter, cheese, lard, vegetables, cotton, tobacco, flour, meal and other provisions.

Fifty-fourth—To regulate the inspection, weighing and measuring of brick, lumber, fire-wood, coal, hay, and any article of merchandise.

Fifty-fifth—To provide for the inspection and sealing of weights and measures.

Fifty-sixth—To enforce the keeping and use of proper weights and measures by vendors.

Fifty-seventh—To regulate the construction, repairs and use of vaults, cisterns, areas, hydrants, pumps, sewers and gutters.

Fifty-eighth—To regulate places of amusement.

Fifty-ninth—To prevent intoxication, fighting, quarreling, dog fights, cock fights, and all disorderly conduct.

Sixtieth—To regulate partition fences and party walls.

Sixty-first—To prescribe the thickness, strength and manner of constructing stone, brick and other buildings, and construction of fire escapes therein.

Sixty-second—The city council, and the president and trustees in villages, for the purposes of guarding against the calamities of fire, shall have power to prescribe the limits within which wooden buildings shall not be erected or placed or repaired, without permission, and to direct that all and any buildings within the fire limits, when the same shall have been damaged by fire, decay or otherwise, to the extent of fifty per cent. of the value, shall be torn down or removed, and to prescribe the manner of ascertaining such damage.

Sixty-third—To prevent the dangerous construction and condition of chimneys, fire-places, hearths, stoves, stove pipes, ovens, boilers and apparatus used in and about any building and manufactory, and to cause the same to be removed or placed in a safe condition, when considered dangerous; to regulate and prevent the carrying on of manufactories, dangerous in causing and promoting fires; to prevent the deposit of ashes in unsafe places, and to cause all such buildings and inclosures as may be in a dangerous state to be put in a safe condition.

Sixty-fourth—To erect engine houses, and provide fire engines, hose carts, hooks and ladders, and other implements for prevention and extinguish-

ment of fires, and provide for the use and management of the same by voluntary fire companies or otherwise.

Sixty-fifth—To regulate and prevent storage of gunpowder, tar, pitch, resin, coal oil, benzine, turpentine, hemp, cotton, nitro-glycerine, petroleum, or any of the products thereof, and other combustible or explosive material, and the use of lights in stables, shops and other places, and the building of bonfires; also to regulate and restrain the use of fireworks, firecrackers, torpedoes, Roman candles, sky rockets, and other pyrotechnic displays.

Sixty-sixth—To regulate the police of the city or village, and pass and enforce all necessary police ordinances.

Sixty-seventh—To provide for the inspection of steam boilers.

Sixty-eighth—To prescribe the duties and powers of a superintendent of police, policemen and watchmen.

Sixty-ninth—To establish and erect calabooses, bridewells, houses of correction and workhouses for the reformation and confinement of vagrants, idle and disorderly persons, and persons convicted of violating any city or village ordinance, and make rules and regulations for the government of the same, and appoint necessary keepers and assistants.

Seventieth—To use the county jail for the confinement or punishment of offenders, subject to such conditions as are imposed by law, and with the consent of the county board.

Seventy-first—To provide by ordinance in regard to the relation between all the officers and employees of the corporation in respect to each other, the corporation and the people.

Seventy-second—To prevent and suppress riots, routs, affrays, noises, disturbances, disorderly assemblies in any public or private place.

Seventy-third—To prohibit and punish cruelty to animals.

Seventy-fourth—To restrain and punish vagrants, mendicants and prostitutes.

Seventy-fifth—To declare what shall be a nuisance, and to abate the same; and to impose fines upon parties who may create, continue or suffer nuisances to exist.

Seventy-sixth—To appoint a board of health, and prescribe its powers and duties.

Seventy-seventh—To erect and establish hospitals, and medical dispensaries, and control and regulate the same.

Seventy-eighth—To do all acts, make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease.

Seventy-ninth—To establish and regulate cemeteries, within or without the corporation, and acquire lands therefor, by purchase or otherwise, and cause cemeteries to be removed, and prohibit their establishment within one mile of the corporation.

Eightieth—To regulate, restrain and prohibit the running at large of horses, cattle, swine, sheep, goats, geese and dogs, and to impose a tax on dogs.

Eighty-first—To direct the location and regulate the management and construction of packing houses, renderies, tallow chandleries, bone factories, soap factories and tanneries, within the limits of the city or village, and within the distance of one mile without the city or village limits.

Eighty-second—To direct the location and regulate the use and construction of breweries, distilleries, livery stables, blacksmith shops and foundries within the limits of the city or village.

Eighty-third—To prohibit any offensive or unwholesome business or establishment within, or within one mile of, the limits of the corporation.

Eighty-fourth—To compel the owners of any grocery, cellar, soap or tallow chandlery, tannery, stable, pig-sty, privy, sewer, or other unwholesome or nauseous house or place, to cleanse, abate, or remove the same, and to regulate the location thereof.

Eighty-fifth—The city council, or trustees of a village, shall have power to provide for the taking of the city or village census; but no city or village census shall be taken by authority of the council or trustees oftener than once in three years.

Eighty-sixth—To provide for the erection and care of all public buildings necessary for the use of the city or village.

Eighty-seventh—To establish ferries, toll bridges, and license and regulate the same, and from time to time fix tolls thereon.

Eighty-eighth—To authorize the construction of mills, mill races and feeders on, through or across the streets of the city or village, at such places and under such restrictions as they shall deem proper.

Eighty-ninth—The city council shall have power, by condemnation or otherwise, to extend any street, alley or highway over or across, or to construct any sewer under or through any railroad track, right of way, or land of any railroad company (within the corporate limits); but where no compensation is made to such railroad company the city shall restore such railroad track, right of way or land to its former state, or in a sufficient manner not to have impaired its usefulness.

Ninetieth[1]—The city council or board of trustees shall have no power to grant the use of or the right to lay down any railroad tracks in any street of the city to any steam, *dummy, electric, cable,* horse †or other† railroad company, ‡whether the same shall be incorporated under any general or special law of the State now or hereafter in force,‡ except upon the petition of the owners of the land representing more than one-half of the frontage of the street, or so much thereof as is sought to be used for railroad purposes;‖ and when the street or part thereof sought to be used shall be more than one

[1] Amendment of subdivision *Ninetieth* made by L. 1887, p. 114, adds words between asterisks (*....*), between daggers (†... †), between double daggers (‡... ‡), and after parallels (‖). 1 Starr & C. Ann. Stat. 712.

mile in extent, no petition of land owners shall be valid unless the same shall be signed by the owners of the land representing more than one-half of the frontage of each mile and of the fraction of a mile if any in excess of the whole miles measuring from the initial point named in such petition, of such street or of the part thereof sought to be used for railroad purposes.

Ninety-first—To tax, license and regulate auctioneers, distillers, brewers, lumber yards, livery stables, public scales, money changers and brokers.

Ninety-second—To prevent and regulate the rolling of hoops, playing of ball, flying of kites, or any other amusement or practice having a tendency to annoy persons passing in the streets or on the sidewalks, or to frighten teams and horses.

Ninety-third—To regulate and prohibit the keeping of any lumber yard, and the placing or piling or selling any lumber, timber, wood or other combustible materials, within the fire limits of the city.

Ninety-fourth—To provide, by ordinance, that all the paper, printing, stationery, blanks, fuel, and all the supplies needed for the use of the city, shall be furnished by contract, let to the lowest bidder.

Ninety-fifth—To tax, license and regulate second-hand and junk stores, and to forbid their purchasing or receiving from minors, without the written consent of their parents or guardians, any article whatsoever.

Ninety-sixth—To pass all ordinances, rules, and make all regulations proper or necessary to carry into effect the powers granted to cities or villages, with such fines or penalties as the city council or board of trustees shall deem proper: *Provided*, no fine or penalty shall exceed $200, and no imprisonment shall exceed six months for one offense.

. . . . . .

ARTICLE X.

(MISCELLANEOUS PROVISIONS.)—WATER.

SECTION 1. The city council or board of trustees shall have power to provide for a supply of water by the boring and sinking of artesian wells, or by the construction and regulation of wells, pumps, cisterns, reservoirs or water-works, and to borrow money therefor, and to authorize any person or private corporation to construct and maintain the same at such rates as may be fixed by ordinance,[1] and for a period not exceeding thirty years; also to prevent the unnecessary waste of water; to prevent the pollution of the water, and injuries to such wells, pumps, cisterns, reservoirs or water-works.

[1] The authority to fix water rates is also conferred in more specific terms by the act of June 6, 1891, which follows this section.

STATUTES IN PARI MATERIA.

Water Rates.

(Approved June 2, 1891, in force July 1, 1891; L. of Ill. 1891, p. 85; 1 Starr & C. Ann. Stat., 2d ed., p. 868.)

AN ACT TO ENABLE CITIES, TOWNS AND VILLAGES INCORPORATED UNDER ANY GENERAL OR SPECIAL LAW OF THIS STATE TO FIX THE RATES AND CHARGES FOR THE SUPPLY OF WATER FURNISHED BY ANY INDIVIDUAL, COMPANY OR CORPORATION TO ANY SUCH CITY, TOWN OR VILLAGE AND THE INHABITANTS THEREOF.

SECTION 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* That the corporate authorities of any city, town or village, now or hereafter incorporated under any general or special law of this State, in which any individual, company or corporation has been, or hereafter may be, authorized by such city, town or village to supply water to such city, town or village and the inhabitants thereof, be and are hereby empowered to prescribe by ordinance maximum rates and charges for the supply of water furnished by such individual, company or corporation to such city, town or village and the inhabitants thereof, such rates and charges to be just and reasonable. And in case the corporate authorities of any such city, town or village shall fix unjust and unreasonable rates and charges, the same may be reviewed and determined by the circuit court of the county in which such city, town or village may be.

Rates of charge for various kinds of quasi public service.

In *pari materia* to the provisions expressly conferring power on the city council to fix the rates of charge by individuals or private corporations for certain designated *quasi* public services, are also other statutes: conferring power on any city or village to "fix the rates of toll" on bridges and ferries owned by it (L. of Ill. 1877, p. 61; 1 Starr & C. Ann. Stat., 2d ed., p. 818; L. of Ill. 1881, p. 57; L. of Ill. 1891, p. 72; 1 Starr & C. Ann. Stat., 2d ed., p. 819); authorizing cities, towns and villages owning and operating water-works to "assess and collect" such "rates for the use and benefit of water" supplied by such water works as they "shall deem just and expedient" (L. of Ill. 1873, p. 191; 1 Starr & C. Ann. Stat., 2d ed., p. 864); providing that "the county board shall fix the rate of ferriage at each ferry" (R. S. of Ill. 1845, p. 253; R. S. of Ill. 1874, p. 531; 2 Starr & C. Ann. Stat., 2d ed., p. 1957), and shall also "fix the rates of toll" on toll bridges (R. S. of Ill. 1845, p. 253; R. S. of Ill. 1874, p. 1060; 3 Starr & C. Ann. Stat., 2d ed., p. 3904), and "fix from time to time such rates of toll to be charged" on toll roads "as may be deemed just and proper and for the public good" (L. of Ill. 1877, p. 211; 3 Starr & C. Ann. Stat., 2d ed., p. 3908); directing the board of railroad and warehouse commissioners to make "a schedule of reasonable maximum rates of charges for the transportation of passengers and freight and cars" on railroads doing business in the state (L. of Ill. 1873, p. 139; L. of Ill. 1873-1874, p. 129; L. of Ill. 1885, p. 232; 3 Starr & C. Ann. Stat., 2d ed., p. 3314); declaring that said board "shall, also, have power to fix the rate of charges for the inspection of grain" (L. of Ill. 1871-1872, p. 768; 3 Starr & C. Ann. Stat., 2d ed., p. 3322; L. of Ill. 1897, p. 301); and prescribing "the maximum charge for storage and handling of grain" (L. of Ill. 1871-1872, p. 769; L. of Ill. 1877, p. 170; 3 Starr & C. Ann. Stat., 2d ed., p. 3323).

CONSOLIDATION OR MERGER ACT, JUNE 5, 1897, IN FORCE JULY 1, 1897.

(L. of Ill. 1897, p. 177.)

AN ACT IN RELATION TO GAS COMPANIES.

§ 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly*, That all gas companies now organized, or hereafter to be organized in this State, are hereby authorized and empowered to sell, transfer and convey or lease their real and personal property, rights, franchises and privileges, in whole or in part, to any other gas company doing business in the same city, town or village, and such other gas company is authorized to purchase or lease and to hold and enjoy said property.

§ 2. It shall be lawful for any gas companies, now organized or hereafter to be organized in this State, doing business in the same city, town or village, to consolidate and merge into a single corporation, which shall be one of said merging and consolidating corporations, by complying with the provisions of this act, as hereinafter specified.

§ 3. All gas companies which are authorized to manufacture and distribute illuminating gas shall have the power to manufacture and distribute gas for fuel purposes and to distribute natural gas, and all companies authorized to distribute gas in any city, town or village shall have the power to distribute the same in any territory annexed to such city, town or village.

§ 4. The purchase and sale or lease, or the consolidation and merger, hereby authorized, may be made in the manner following: The respective boards of directors or trustees of the company or companies proposing to sell and lease its or their property, and of the company proposing to purchase or lease the same, as under section 1, or of the companies proposing to consolidate and merge into a

single corporation, as under section 2, may enter into and make an agreement, or agreements, under their respective corporate seals, for such sale or purchase or lease, or for such consolidation and merger, describing the terms and conditions thereof and the mode of carrying the same into effect.

§ 5. Before taking effect, the agreement or agreements for sale and purchase or lease, or for such consolidation and merger, authorized by this act, shall be submitted to any annual meeting or to a special meeting of the stockholders of each of the companies. Such special meeting shall be called by delivering personally, or depositing in the post office, at least thirty days before the time fixed for such meetings, a notice addressed to each stockholder of the company whose address is known to the secretary of the company, signed by a majority of the directors or trustees of the company, stating the time, place and object of such meeting. Such stockholders, whose addresses shall be to the secretary unknown, shall be notified by a general notice of the time, place and object of such meeting by publication once a week, for three successive weeks, in some newspaper printed in the county in which the principal business office of such company is located.

§ 6. At any such annual or special meeting, stockholders may vote in person or by proxy, each stockholder being entitled to one vote for each share of stock held by him, and at such meeting there shall be submitted the proposed agreement or agreements. Votes representing two-thirds of all the outstanding capital stock of each company shall be necessary for the ratification of such agreement or agreements, if there be represented and is voted at such meeting, in person, or by proxy, not less than two-thirds of such outstanding capital stock. If less than two-thirds of such capital stock be represented and voted at such meeting, and if there be presented at such meeting the acknowledgments in writing of the receipt of notice of such meeting, from the owners

of stock not represented and voted, to such an amount as would make not less than two-thirds of such outstanding capital stock, when added to the stock represented and voted, then such agreement or agreements may be ratified by the vote of two-thirds of the capital stock represented and voted at such meeting.

§ 7. If any stockholder of any of the companies, parties to the agreement or agreements provided for in section 4, not voting in favor of or not acquiescing in such agreement or agreements, objects to the purchase or lease, or the consolidation and merger, as defined in said agreement or agreements, he shall give notice of his dissent within thirty days of such meeting and may demand payment for his stock, and shall thereupon receive from such corporation in which he shall hold stock, its fair cash value, at the time when the vote for the agreement or agreements was so cast, and such corporation shall cancel the same. But if such dissenting stockholder shall refuse to part with his stock, or if the value of the same cannot be agreed upon, then such corporation shall, within ninety days of the time of said meeting, proceed to take and acquire the same and the interest of said dissenting stockholder therein, by the exercise of the power and right of eminent domain, hereby granted to such corporation for that purpose, and paying to, or tendering to, such dissenting stockholder, or to the county treasurer for his use, the value of the stock by him held, such value to be ascertained as of the time aforesaid and to be found and determined in the manner provided for the condemnation of property for public use in the act entitled "An act to provide for the exercise of the right of eminent domain." Any stock so acquired shall be cancelled by the company acquiring the same. If such stockholder shall not give notice of his dissent within thirty days, as aforesaid, he shall be held to have acquiesced in the agreement aforesaid, and shall be subject thereto.

§ 8. If the agreement or agreements aforesaid shall be approved at each of such meetings of the respective stockholders of each company separately, in the manner herein described, the same shall be the agreement or the agreements of such companies respectively, and a sworn copy of the proceedings of such meetings, made by the secretaries thereof, respectively, shall be presumptive evidence of the holding and actions of such meetings. A certificate of such sale and purchase or lease, or of such consolidation and merger, shall be made by the president of each of the companies, under the seal of the company, and verified by his affidavit, and shall be filed in the office of the Secretary of State, and of the recorder of deeds in the county where such companies carry on their business, whereupon the agreement or agreements aforesaid shall be in full force and effect. The companies, parties to the agreement or agreements, which provide for consolidation and merger, shall thereupon be and are hereby declared to be consolidated and merged into the one corporation specified in such agreement or agreements. Upon the purchase or lease or consolidation and merger hereby authorized being perfected, a notice thereof shall be published in some newspaper in the county in which the principal office of such corporation is located, for three successive weeks.

§ 9. Any corporation purchasing or leasing the real and personal property of any other company or companies, as provided for in section 1, or any consolidated corporation, as authorized by section 2, shall be subject to and shall perform, for each of the companies so entering into said agreement or agreements, the legal obligations now resting upon each of them, respectively, under their respective charters and ordinances, except where the provisions thereof conflict with the exercise of the powers herein granted, in the same manner and to the same extent as if the companies had remained individual and distinct; and such performance by

said corporation so purchasing or leasing, or by such consolidated corporation, shall be held and considered as the performance by each of the respective companies so selling, leasing or consolidating of the legal obligations theretofore resting upon each of them respectively: *Provided, however*, that nothing in this act shall be construed as extinguishing said companies entering into the agreement or agreements mentioned in this act, or annulling or impairing any of their respective franchises, licenses, or privileges, but they shall severally be regarded as still subsisting, so far as their continuance for the purpose of upholding any right, title or interest, power, privilege or immunity ever exercised or enjoyed by any of them may be necessary for the protection of their respective creditors or mortgagees, or any of them; the separate exercise of their respective powers, and the separate enjoyment of their separate privileges and immunities being suspended until the protection of such creditors or mortgagees shall require their resumption, when such suspension shall cease, so far as, and for such time as, the protection of such creditors or mortgagees may require.

§ 10. The purchase and sale or lease, or the consolidation and merger authorized by this act, shall not be held or construed as a violation of the provisions of any ordinance or bond given thereunder, and shall in no way affect suits pending in which such company or companies shall be parties, and shall not affect causes of action or rights of individuals in any particular. In case the property sold and purchased or leased, or acquired through consolidation and merger, under this act, is subject to mortgage or other lien, such mortgage or other lien shall be and remain a lien upon all properties so sold and purchased or leased, or acquired as aforesaid, so that the same shall be liable for and respond to the payment of such mortgage or other lien existing at the time of such sale or lease, or consolidation and merger, before being

liable for the payment of the debts and liabilities of the company so purchasing or leasing such property, or acquiring the same as aforesaid. Any corporation purchasing or leasing the real and personal property of any other company or companies as provided for in section 1, or any consolidated corporation, as authorized by section 2, shall pay and discharge all debts and liabilities of each of the companies so entering into said agreement or agreements, and actions may be brought and maintained and recovery had therefor against the company so purchasing or leasing, or against such consolidated corporation.

§ 11. Any corporation purchasing or leasing the property of any company or companies, or into which any company or companies are consolidated and merged under this act, shall be, at the time of availing itself of or accepting the benefits of this act, in the actual business of furnishing gas to consumers; and shall be subject to the following provisions:

Such corporation shall not increase the price charged by it for gas of the quality furnished to consumers during any part of the year immediately preceding such purchase or lease, or such consolidation and merger.

Such corporation shall furnish gas to consumers as good in quality as it furnished previous to such purchase or lease, or such consolidation and merger.

§ 12. Any company violating either of the provisions of the preceding section shall be liable in damages therefor to the person aggrieved, and shall, for each offense, forfeit two hundred dollars, to be recovered in an action of debt, in the name of the People of the State of Illinois, or by any person who may sue for the same. Such company shall also be liable to proceedings in *quo warranto*, for violation of either of said provisions, and if adjudged guilty, the court may give judgment of ouster from its franchises, unless the company shall cease and dis-

continue such violation, as and when determined by the court.

And any director or directors, officer or officers, or agent or agents, of such company, who shall willfully and knowingly violate, or be concerned in the willful violation of either of the provisions of the preceding section, shall for each offense, forfeit one thousand dollars, to be recovered in an action of debt, in the name of the People of the State of Illinois.

ORDINANCE FIXING PRICE OF GAS, OCTOBER 15, 1900, IN FORCE JANUARY 2, 1901.

(Record, p. 78.)

Be it ordained by the city council of the city of Chicago:

SEC. 1. That no corporation, company or companies, firm or persons manufacturing, selling, supplying or distributing gas in the city of Chicago for illuminating or for fuel purposes shall charge, exact, demand or collect from any consumer thereof more than the sum of seventy-five (75) cents per one thousand (1,000) cubic feet of gas consumed or used. Said sum of seventy-five (75) cents per one thousand (1,000) cubic feet of gas shall be the net price charged, exacted, demanded or collected from each consumer. Manufactured gas so furnished shall afford a light of not less than twenty (20) candle-power, to be measured and ascertained at the place of consumption in said city by the most modern appliances known to science for measuring the candle-power of illuminating gas.

Provided, however, That any corporation, company or companies, firm or person distributing or selling gas for fuel or illuminating purposes in the city of Chicago may, in addition to said seventy-five (75) cents per one thousand cubic feet of gas furnished to such consumer, add a penalty of not exceeding ten (10) cents for each one thousand (1,000) cubic feet of gas so supplied to such consumer for delinquency or non-payment of the bill, statement or charge of said corporation, company or companies, firm or person after ten days from the date at which said bill, statement or charge is made and furnished to such consumer.

SEC. 2. That any company, corporation, person or persons who shall remove any meter or meters

from the house, store, factory or premises of any consumer of gas in the city of Chicago, against the will and consent of any such consumer of gas who is willing to pay for gas furnished him, it or them by any such company, corporation, person or persons, and tenders the amount due at the price established and fixed in section 1 of this ordinance, shall be subject to a penalty of not less than twenty-five ($25) nor more than two hundred ($200) dollars for each and every offense; *Provided, however,* That any company, corporation, person or persons furnishing gas to consumers in the city of Chicago shall have the right to remove any meter or meters for the purpose of repairing the same, on condition that such meter or meters so removed shall be replaced or a new one substituted in its place within twenty-four (24) hours of the time of the removal of any such meter or meters.

SEC. 3. That any company, corporation, person or persons who shall, in violation of the provisions of the preceding sections, charge or require the city of Chicago, or any citizen thereof, or any consumer of gas therein, to pay for gas furnished to it or them, or either of them, a sum in excess of seventy-five (75) cents per thousand cubic feet, or who shall furnish to the said city of Chicago, or any citizen thereof, manufactured gas less than twenty (20) candle-power shall be subject to a penalty of not less than twenty-five dollars ($25), nor more than two hundred dollars ($200) for each and every offense.

SEC. 4. This ordinance shall be in full force and effect from and after the 2d day of January, A. D. 1901; *Provided,* That said ordinance shall not go into effect until it has been duly published, as provided by law.

PROPOSED ACT PREPARED AFTER PASSAGE OF ORDINANCE BY CITY COUNCIL OF CHICAGO FOR SUBMISSION TO ILLINOIS LEGISLATURE.

(Approved by unanimous vote, January 21, 1901.)

AN ACT TO AUTHORIZE CITIES AND VILLAGES WITHIN THE STATE OF ILLINOIS TO REGULATE THE PRICE OF GAS FURNISHED BY PRIVATE CORPORATIONS, COMPANIES AND INDIVIDUALS DOING BUSINESS WITHIN SUCH CITIES AND VILLAGES, AND TO REGULATE THE CONDUCT OF SUCH CORPORATIONS, COMPANIES AND INDIVIDUALS.

SECTION 1. *Be it enacted by the People of the State of Illinois represented in the general assembly:* That full power and authority be and it hereby is conferred upon the city council or board of trustees of any city or village within the state of Illinois to regulate by ordinance the price of gas furnished to the inhabitants in such city or village by any corporation, company or person; provided, that in case any such corporation, company or person shall feel aggrieved at the price fixed by such city council or board of trustees, such corporation, company or person may file a petition in the circuit court of the county in which such city or village may be located, and such city or village may be made a party defendant to said petition, and jurisdiction may be obtained over it by service of summons in the usual manner, and issues shall be formed in said proceeding, and thereupon said circuit court shall hear and determine the issues in said proceeding, and in case said court shall find that the price fixed by said ordinance is unreasonable, the court shall order that said ordinance be annulled; and, provided further, that either party to said proceeding may appeal from the decree of said circuit court to the Appellate Court, and from the Appellate Court to the Supreme Court.

SECTION 2. No person shall, by reason of his being an inhabitant of or freeholder in said city or village, be incompetent to act as a judge or juror in any action or proceeding in which said city or village may be a party in interest.

OPINIONS CHICAGO CORPORATION COUNSEL.

Opinion of Francis Adams on the power to fix gas rates.

(Op. Corp. Counsel and Assts.[1], 1872–1897, p. 41.)

October 18, 1881.

Mr. Patrick Sanders, Chairman, Committee on Gas Lights.

Dear Sir:

Your committee has referred to me a bill for "An ordinance concerning gas companies" for an opinion as to whether the bill if it becomes an ordinance, can be enforced.

The bill is in terms applicable to all persons, firms, and incorporated companies engaged in the manufacture of illuminating gas.

Section 1 requires an annual license to be taken out, and the payment into the city treasury of $50.00 for such license, under a penalty of not less than one hundred nor more than two hundred dollars.

Section 2 prescribes a standard for gas, viz: "Gas which burning at the rate of five cubic feet per hour shall emit a light equal to that produced by eighteen standard sperm candles, each burning at the rate of one hundred and twenty grains per hour."

Section 3 makes it the duty of each person, firm, or corporation engaged in the manufacture of illuminating gas to publish every day in an evening city newspaper the illuminating quality, "by candle power of the gas manufactured that day."

Section 4 provides, substantially, that the charge for gas shall be in proportion to its illuminating power, etc.

Section 5 requires an affidavit to be filed with the city clerk by every manufacturer of illuminating

[1]Published in 1897 "by direction of the city council, under the supervision of the corporation counsel," Mr. William G. Beale.

gas, on the first Monday in October of every year, showing that the provisions of Section 4 have been complied with.

Section 6 imposes a penalty of not less than one hundred nor more than two hundred dollars for each violation of the ordinance.

It is well known that the "Chicago Gas Light & Coke Company" and "The People's Gas Light & Coke Company," which are incorporated companies, supply illuminating gas to the city, and they are the only companies supplying such gas. This being true, the conclusion must be that the ordinance is intended to operate on these companies, as otherwise, it would be without practical effect.

The power to pass the bill in question must be conferred by the charter of the city, or some statute, else it does not exist.

The gas companies cannot be regulated, or compelled to take out a license, unless the power to license, or regulate is expressly conferred. Such power is not conferred by the charter of the gas companies, the charter of the city, or any law of which I have any knowledge.

The only power of regulation conferred upon the city in the premises is to regulate the openings in the streets, alleys, and public grounds, for the laying of gas mains and pipes, and erecting gas lights.

I am, therefore, of opinion that the council is powerless to pass the bill.

The council, however, in consenting by ordinance to the erection of gas factories, and the laying of pipes in the streets by new companies, has power to impose such regulations as it may see fit to impose.

Mun. Code, Art. V, Sec. 1, Sub-sec. 13.

Respectfully,

FRANCIS ADAMS,
Corporation Counsel.

Opinion of C. S. Darrow on the power to fix gas rates.

(Op. Corp. Counsel and Assts., 1872–1897, p. 147.)

March 22, 1890.

To the Committee on Gas, Oil & Electric Lights.

Gentlemen:

The opinion of this department has been asked as to the right of the city to regulate the price to be charged by the various gas companies, doing business in the city of Chicago to the consumers of their product.

It has often been decided that the state legislature has the right to regulate the charges of the companies or corporations engaged in business of a public nature, or whose duty, by reason of the franchises and privileges given it, is to serve the public as well as to promote the interests of their stockholders, unless prevented by an express provision of the charter granted to such company. This has been frequently held of railroad companies, warehouse companies, telephone companies and the like.

In support of this proposition a long line of cases might be cited, among which are:

Dow vs. Beidleman, 125 U. S. 680.

St. Louis vs. Bell Telephone Company, 98 Mo. 623.

Illinois Central Railroad Company vs. People, 108 U. S. 541.

Munn vs. The People, 69 Ill. 80; which case was affirmed in the 94 U. S. 113.

Ruggles vs. People, 91 Ill. 256; affirmed in 108 U. S. 526.

People vs. Budd, decided by the N. Y. Court of Appeals, 22 North-Western Reporter, 670.

Spring Valley Water Works vs. Schottler, *et al*, 110 U. S. 347.

The right of the legislature to control and regulate gas companies has been expressly upheld in:

34 Ohio State, in State vs. Gas Company, 572.

The State vs. Gas Company, 18 Ohio State, 262.

Chicago Gas Light and Coke Company vs. Gas Company, 121 Ill. 530.

The decisions in these cases were rendered upon the theory that such business as the operation of railroads, warehouses, telephone companies, supplying gas, water and the like, were, in their nature public, and should be conducted for the public good, as well as for private gain.

In the case of the Chicago Gas Light and Coke Company vs. People's Gas Light and Coke Company, the Supreme Court, in rendering its decision, used the following language:

"The manufacture and distribution of illuminating gas, by means of pipes or conduits placed under legislative authority in the streets of a town or city, is a business of a public character. It is the exercise of the franchise belonging to the state. The services rendered, and to be rendered, for such grant, are of a public nature. Such right is conferred by legislative grant as well for the benefit of the public as of the corporation taking the same."

The question, then, for determination is, whether the power to regulate and control the price of gas has been delegated to the city council.

It is well settled that the city council has no powers except those which have been delegated to it by the legislature, or which are necessary for the purpose of carrying out the powers granted by the legislature.

This proposition has been repeatedly laid down by our Supreme Court, as well as by the courts of other states. In support of which the following cases may be cited:

Huesing vs. Rock Island, 128 Ill. 465.

Mather vs. Ottawa, 114 Ill. 660.

Chicago vs. Case, 126 Ill. 278.

St. Louis vs. Bell Telephone Company, 96 Mo. 673.

The legislature has nowhere expressly delegated

to the city council the right of regulating the charge of gas companies. If the city council has any power in that question it must be under some general provision of the city charter.

The only general provisions that, in my opinion, could in any way be said to be applicable thereto, are:

First.—Subdivisions 11 and 13 of Section 1, Article V, which provide, in reference to public streets, that the city council shall have power to provide for the lightning of the same, and to regulate the openings therein for the laying of gas or water mains and pipes, and the building and repairing of sewers, tunnels and drains, and erecting gas lights; provided, however, that any company heretofore organized under the general laws of this state, or any association of persons organized, or which may be hereafter organized for the purpose of manufacturing illuminating gas to supply cities or villages, or the inhabitants thereof, with the same, shall have the right, by consent of the common council, subject to existing rights, to erect gas factories, and lay down pipes in the streets or alleys of any city or village in this state, subject to such regulations as any such city or village may by ordinance impose.

The rights herewith granted are meant to be given in relation to the public streets, and while it would doubtless give the city council the power to prescribe by any ordinance giving the right to any gas company to use the public streets, terms and conditions upon which such right should be exercised, it would not, in my opinion, give the city council any power to control the charges of gas companies to private consumers where no conditions were imposed at the time of granting the right to said companies to occupy and lay their mains in streets.

If these charter provisions can be held to allow any regulation by the council after pipes have been laid, and factories built, such regulations must, in

my opinion, have reference to the manner in which the pipes are laid, or the factories constructed.

Second.—Under Subdivision 66, of Section 1, or Article V, which gives power to the city to regulate the police of the city or village, and pass and enforce all necessary police ordinances.

It is doubtless a question just how far a city may go under the exercise of its general police power.

The city may pass ordinances concerning vagrants, prohibiting persons from keeping open their places of business on Sunday, from cruelty to animals, and regulating many affairs and providing many regulations which conduce to the general welfare, but to say under this provision that the city would have the right to fix the compensation of gas companies, would, in my opinion, be interpreting the police powers to be broader than the courts would sustain. It seems to me clear that the legislature did not intend by the general provision granting police powers to cities to allow municipal corporations to fix the rates of gas companies.

The legislature has expressly given cities the power to license, tax and regulate hackmen, draymen, omnibus drivers, carters, cabmen, porters and expressmen, and other like occupations, and to prescribe their compensation, from which it seems that the legislature did not consider that the general police powers would be sufficiently broad to provide for the regulation of these occupations. Had the legislature intended that gas companies should be regulated as provided in the occupations above enumerated, it seems to me they would have been included with the rest.

In the language of the Missouri court, in the case of St. Louis vs. Shuebrush, 95 Mo. 618, I would say: "With this specific enumeration of cases where the city may regulate the compensation to be charged, it impliedly appears that such was not intended to be given in other cases."

The Supreme Court of Illinois has, substantially,

affirmed this doctrine to be the law in the case of City of Cairo vs. Bross, 101 Ill. 495.

It may at least be said that the right of the city council to regulate charges of gas companies is so exceedingly doubtful, and the way to obtain such right by appeal to the legislature is so plain, that it would be ill-advised to attempt the exercise of such powers without the express authority of the legislature.

Respectfully submitted,

C. S. DARROW,
Asst. Corporation Counsel.

Opinion of John W. Green on the power to fix telephone rates.

(Op. Corp. Counsel and Assts., 1872–1897, p. 111.)

September 10, 1888.

To the Financial Committee.

Gentlemen:

In compliance with your request I herewith submit an opinion as to the validity of an ordinance proposing to fix the annual rates to be charged for telephone.

The question involved is whether the city council is vested with power to fix the rates set forth in the ordinance submitted. The power to regulate the rates to be charged for telephones must be derived from General Corporation Act, under which the city is incorporated. Corporate authorities, acting under its provisions, can only exercise such powers and rights as are clearly comprehended within the words of the act or derived therefrom by necessary implication.

McAllister, J., in People vs. Howard, says, "That the following summary of Judge Dillon, Section 89, page 115, is the best summary of all the decisions upon that point to be found in all the books."

"It is a general and undisputed proposition of law that a *municipal corporation possesses and can exercise the following* powers and no others: First, those granted in *express words*. Second, those *necessarily or fairly* implied in or *incident* to the powers expressly granted. Third, those essential to the declared objects and purposes of the corporation, not simply convenient but indispensable."

The Supreme Court of the State in the case of the City of Cairo vs. Bross, 101 Ill., page 478, says: "When the legislature, by the general incorporation act, declares that the corporate authorities of

cities and villages organized and acting under its provisions shall have power to license certain occupations and kinds of business, specifically enumerating them, such declaration must, by a familiar canon of construction, be construed precisely as if the act in express terms inhibited the licensing of all trades and occupations not contained in the enumeration."

The Supreme Court of the United States in Thomas vs. West Jersey Railroad Company, 101 U. S. 82, says: "Conceding the rule applicable to all statutes, that what is fairly implied is as much granted as what is expressed, it remains that the charter of a corporation is the measure of its powers, and that the enumeration of those powers implies the exclusion of all others."

Mather vs. City of Ottawa, 114 Ill., p. 659.
City of Champaign vs. Harmon, 98 Ill., p. 494.
Gaddes vs. Richland County, 92 Ill., p. 123.
Cook County vs. McCrea, 93 Ill., p. 238.

It cannot be seriously contended that the express power to regulate the rates to be charged for telephones is embraced within the expressed charter powers of the City Council.

My attention has been called to the fact that the city council of the city of Cleveland passed an ordinance regulating the price of gas, but your attention is respectfully called to the fact that the power is expressly delegated by section 2478 of the Ohio statute, to wit:

"The Council of any city or village in which gas companies, or gas light, or coke companies may be established are hereby empowered to regulate from time to time the price which said gas or gas light and coke companies may charge for gas furnished by such companies to the citizens, public grounds and buildings, streets, lanes, alleys, avenues, wharves and landing places, and such gas light or gas light and coke companies *shall in no event*

charge more for any gas furnished to such corporation or individuals than the price specified by ordinance of such Council."

The validity of the ordinance was tested in the Circuit Court of Cuyahoga County, State of Ohio, in the case of the State of Ohio vs. The Cleveland Gaslight and Coke Company, and Upson, J., says: "It will be seen by an examination of the ordinance that it literally complies with the provisions of the section of the statute. The statute provides that the Council of the city are empowered to regulate the price which said gas or gas light and coke companies may charge for gas. The ordinance is within the strict letter of the provisions of the statute authorizing the City Council to pass such ordinance."

In this case the power was specifically granted by the legislature.

My attention has been called to an ordinance passed by the city council of the city of St. Louis, regulating rates to be charged for telephones. The city charter of the city of St. Louis gives to the city council the power to license, tax and regulate among many other vocations specifically enumerated, bankers, *or other corporations and institutions*, and the general power to *tax, license and regulate all occupations and trades not heretofore enumerated, of whatever name or character.*

In the ordinance giving to telephone companies the right to transact business in the city of St. Louis, it is provided, "That the city of St. Louis *reserves the right to fix the rates* and charges for the use of telephones."

When the question of imposing a license fee on telegraph and telephone companies, the amount of the fee to be determined by the number of poles in use, was submitted to Judge Grinnell, then the city attorney of the city of Chicago, he decided as follows:

"By the general ordinance of the city, no additional wires can be run underground, and no more

poles erected, so, in fact, the enclosed ordinance is to compel the companies to pay a tax or license on existing poles, and unless there is a reservation in the ordinance granting the privileges to erect poles, that the company shall pay a tax or license fee in the manner suggested, the ordinance is of no force or effect, as I understand there is no such reservation."

The power not being specifically enumerated in the charter, if it exists at all, must be found in the general police power of the city, embraced in the powers granted to the City Council by Subdivision 66 of Section 63 of the General Incorporation Law. The power there given is to "regulate the police of the city and enforce all necessary police ordinances."

Justice Lacey, in the case of the Village of Chebanse vs. McPherson, 15 Bradwell, p. 313, says: "The general police power of the *State Legislature* to pass laws for the benefit of the people and society generally is very comprehensive and is used in an enlarged sense, permitting the passage of laws for the protection of life, liberty, and property, or laws for the general welfare, only limited by the provision of the Constitution, *but the word has a more limited and restricted sense as used in paragraph 66, Section 1, Article V, of the General Incorporation Act*, in relation to cities, towns and villages, and may be regarded as restricted to those subjects pertaining to health, morals and good order of the people within the city, town or village."

Hawthorn vs. People, 109 Ill., 302.

As to the construction of the police power of the city, Justice Bailey, in the late case of the City of Chicago vs. Phœnix Insurance Company, says: "It is urged, however, that the power to license, regulate and tax the business of a fire insurance is a police power, that is embraced within the power granted to the City Council by Subdivision 66 of Section 63, of the General Incorporation Law.

The power here given is to 'regulate the police of the city, and pass and enforce all necessary police ordinances.' The statute, while giving such general power, specifically sets forth a great number of subjects of municipal legislation, most of them matters of police regulation, and prescribes the manner and extent of the exercise of the police power over them respectively. Among the subjects thus specifically subjected to police regulation are various avocations and kinds of business, that of fire insurance not being of the number. In another part of the statute, however, the contribution which foreign insurance companies are required to make to the municipal government is especially prescribed, and no provision is there made for any control by the municipal authorities over such companies or their agents beyond that of collecting and receiving the tax thus imposed. Under these circumstances it is manifest that the licensing and taxing of foreign insurance companies, even if held to be proper subjects for police regulation, are not within the grant of power given to the Common Council by the general laws of the statute authorizing it to regulate the police of the city.

"Judge Dillon, in his treatise on Municipal Corporations, says: 'Occasionally the charter or Incorporation Act, without any specific enumeration of the purpose for which by-laws may be made, contains a general and comprehensive grant of power to pass all such as may seem necessary to the well being and good order of the place. More frequently, however, the charter of an incorporating act authorizes the enactment of by-laws in certain specified cases and for certain purposes, and after this specific enumeration a general provision is added that the corporation may make any other by-laws or regulations necessary to its welfare, good order, etc., not inconsistent with the constitution or laws of the state.

"This difference is essential to be observed, for the power which the corporation would possess un-

der what may, from convenience, be termed the general welfare clause, if it stood *alone*, may be limited, qualified, or, when such intent is manifest, impliedly taken away by provisions specifying the particular purposes for which by-laws may be made. 1 Dillon on Municipal Corporations, No. 315. See also State vs. Ferguson, 33 N. H. 424."

This case was appealed to the Supreme Court and they say, that it would be a difficult task to formulate a general rule which would determine definitely the character and scope of every ordinance which a city might pass under this clause of the statute. They dispose of the question that under the police power an ordinance may be passed for the purpose of raising a revenue by licenses, by saying, that it is a subject foreign to the police power conferred on incorporated towns and cities by the statute.

Under the decisions of the case by the Appellate Court of the City of Chicago vs. Phœnix Insurance Company, there would be no question that the right to fix the rates to be charged for the telephones would not come within the police power of the city council.

The Supreme Court refused to pass upon the question when it was directly presented in the argument and until the Supreme Court shall construe this question, the decision of the Appellate Court shall govern the rulings of this department.

JOHN W. GREEN,
Corporation Counsel.

Opinion of William G. Beale on the power to fix telephone rates.

(Op. Corp. Counsel and Assts., 1872–1897, p. 320.)

November 7, 1896.

Noble B. Judah, Esq., Chairman Committee on Judiciary, City Council.

Dear Sir:

There was recently submitted to this office a resolution pending before your committee under reference from the council, as follows:

"Whereas, it is charged that the Chicago Telephone Company is putting in telephones in drug stores, hotels and other places in connection with slot machines, by which the use of said telephone is payable by the public inserting a certain amount in said slot machine contrary to the letter and spirit of the acts and ordinances of the City Council of Chicago granting the right to said Telephone Company to maintain a telephone service in the City of Chicago, therefore, be it

"Resolved by the Common Council of the City of Chicago that for the purpose of investigating the matter of the use of slot machines in connection with the telephone service of this city, and that said committee make proper report thereof to this Council."

In connection with this resolution this office is formally asked "for an opinion (1) as to the rates which the Chicago Telephone Company has the right to charge, and (2) as to its power to place the slot machines in drug stores, hotels, etc., and (3) what power the City of Chicago has to regulate said Company's charges and rates." Informal inquiry is also made (4) as to the power of the city to impose a license in respect to telephones.

I am able to answer these inquiries without much difficulty or hesitation, particularly as the more important of them have heretofore been considered by this department.

(1) The ordinance passed January 4, 1889, under which the Chicago Telephone Company does business, provides in Section six (6) that the company during the life of the ordinance "shall not increase to its present or future subscriber the rates for telephone service now established," and that "there shall be filed by said company a schedule showing the rates charged by said company for telephone service at the date of the passage of this ordinance within the limits of the City of Chicago." This is the only provision of statute or ordinance known to me to be in force in this city bearing upon the subject. There is printed in Myers' Laws and Ordinances of 1890, Sections 4503 to 4515 inclusive, an ordinance passed October 15, 1888, in favor of the telephone company, prescribing different rates, but this ordinance of October 15, 1888, was never accepted by the telephone company, and therefore by its own terms it never went into actual effect.

Pursuant to the ordinance of January 4, 1889, the telephone company filed its schedule of rates for telephone service established (see Council Proceedings of 1888 and 1889, page 846, February 11, 1889) and the rates therein mentioned I regard as its lawful maximum rates to-day to its subscribers for like service. In cases where by special arrangement the company installed the metallic return circuit and long distance instrument instead of the single wire and grounded circuit everywhere in use at the time the ordinance was passed, and still largely used, or installs its so-called "express service," or installs both of these improvements, it charges an extra price therefor, and I do not see why it may not rightfully do so. At least it can refuse to furnish the improved service at the prices for which it must furnish the ordinary service.

I assume that the committee does not desire me to set forth in detail the rates given in the schedules filed, as these schedules are equally accessible to the members of the committee, and that the foregoing general reference will be found sufficient.

(2) The "slot" machines, so-called, are merely telephones fitted with coin receiving and registering devices. The telephone company has the same power to install these combination instruments which it has to install any other form of telephone desired. It cannot force them upon anybody if they are not wanted. But I do not understand that these coin-collecting instruments are in fact furnished for private use at all. They are not rented to subscribers as ordinary telephones are rented, so as to become for the time being the telephones of the subscribers, but on the contrary the telephone company hires the room or the space in which to place them and installs them as its own telephones for public use. A person from whom space is thus rented apparently steps into the relation of agent of the telephone company to care for the instrument instead of having the partially independent control of it as an ordinary subscriber has of his telephone. The relation of the telephone company to these combination instruments so placed, appears to be legally the same as its relation to the instruments which it has in its own public exchanges. In one case it rents a little space in a store or office; in the other, it rents a room or several rooms, or perhaps a building. In both cases the telephone instruments stand on the same legal footing. There are apparently no "subscribers" in relation to them, and they do not appear to be affected by the above quoted ordinance provision.

(3) I think it is clear that the city of Chicago has no power to regulate telephone charges and rates. An extended opinion to this effect was given by Corporation Counsel Green in 1888, and is printed in the Council Proceedings of 1888 and 1889, beginning at page 677, under the date of December 21, 1888. His conclusions seem to be correct. I understand that a similar opinion was given by Corporation Counsel

Winston, but it does not appear to have been printed.

The idea has been expressed that the above quoted language in the telephone ordinance gives the city the right to regulate the rates of the telephone company. This is plainly an erroneous view. In the first place, it is to be noticed that the phraseology of the ordinance provision is altogether insufficient for the purpose. It is a mere prohibition upon an increase of rates, which prohibition is valid only because accepted by the telephone company. Like any ordinary contract, if violated, relief must be had in the courts, for the city has not reserved in the ordinance any right of action in case of such violation. In the second place, I think it may fairly be said that such a right or power as that of prescribing rates of compensation in any business cannot be effectually acquired by a city by virtue of its own ordinances. There must be charter or statutory authority underlying it. The city of St. Louis some years ago passed an ordinance in favor of a telephone company, in which it expressly reserved the right to fix the rates and charges for the use of telephones. Subsequently it passed an ordinance fixing telephone rates, but the Supreme Court of Missouri, in The City of St. Louis vs. Bell Telephone Company, 96 Mo., 623, held this regulating ordinance void on the ground that the city had no charter authority to regulate telephone rates.

The provision of the ordinance of January 4, 1889, prescribing the maximum telephone rates, constitutes a contract between the city and telephone company for the private benefit of telephone subscribers. If the city had power to enter into this contract provision, as I am inclined to think it had, the provision is valid and enforceable; otherwise it is not. Under a well-settled rule of law, any subscriber is entitled to substantially the same rights and remedies under this contract provision as if it had been made directly by such subscriber with the telephone company, unless such rights have been waived.

(4) The city of Chicago does not appear to possess any authority to impose a telephone license. This question also was carefully considered by Corporation Counsel Green on two different occasions, and you will find his opinions in the council proceedings for 1887 and 1888, on pages 151 and 535. I see no reason for changing the previous decision of this department on this question.

Very respectfully yours,

WM. G. BEALE,

Corporation Counsel.

Opinion of Charles M. Walker on the power to fix gas rates.

(Not officially reported.)

May 26, 1899.

To the Honorable, the City Council of the City of Chicago.

Gentlemen:

At your last meeting you adopted a resolution asking for my opinion as to the legal right of your Honorable Body to fix the price of gas used in the city's street lamps, and also as to your right to fix the price of gas to private consumers.

In response to your request you will permit me to say that until quite recently the subject was one regarding which there could be no hesitation in giving an opinion. It is true that the question as to the power of a municipality, acting through its proper channels, to regulate the price of gas or of any other commodity sold or service rendered by any *quasi* public corporation, has not been directly passed on by the Supreme Court of this state in any case where the power was not in express terms conferred. Nevertheless I should have considered the general rule, that a municipal corporation has no power of this kind, except as expressly granted or as necessarily implied from powers granted, to apply. The sole question, then, would have been whether any such power to regulate the price of gas, either as supplied to the city itself or to the public generally, was to be found expressed or implied in the incorporation act (Revised Statutes, Chapter 24). No such expressed power is contained in the act. Numerous decisions of this state tend most strongly against the implication of the power from any grant of authority therein contained.

Until the recent cases of *Rogers Park Water Company* v. *Fergus*, 178 Ill. 571; and *People* v. *Suburban R. R. Co.*, 178 Ill. 594, I should have had, as already indicated, no hesitation in finding that a city council possesses no legal right to regulate the

price of gas, except in those cases where the regulation is inserted in an ordinance as a condition to the grant of a franchise to the gas company. Neither decision just cited covers the point at issue. In the *Fergus* case the power to regulate the water rates was conferred by express grant. In the *Suburban Railroad Company* case the regulation by the Village of River Forest of the rates of fare of the railroad company was adopted as a condition in an ordinance granting the company certain privileges. The language, however, used by the court in both these cases goes much further than was necessary for their mere decision. The general result of that language may be told briefly by the statement that the court seems to indicate that where a *quasi* public corporation has received valuable and important franchises from the public it is bound in a special way to exert its powers for the benefit of the public, and that among other duties, it is bound to serve the public for a return in money that shall not be extortionate in amount. As the court said in the *Suburban Railroad Company* case:

"It is not a private but a *quasi* public corporation, and owes it as a duty to the public to demand reasonable rates only for the transportation of passengers and to serve its patrons without unjust discrimination, and this duty may be enforced by the state, acting directly or through a governmental agency."

By a "governmental agency" the court here is speaking of the municipal body. Had the court meant that this control could be exerted by the municipal body only where there was an express grant of power to that end, the language would have little meaning. It seems to be the intention of the court to declare, although perhaps vaguely, that where a *quasi* public corporation demands rates which are unreasonable or extortionate, the municipal corporation is clothed with the power, either under the general police power or under the

express power regarding streets and alleys, to prevent such extortion and to reduce the rates demanded to a point where they become reasonable.

The most that can be said is that I believe it doubtful that the Supreme Court would go to the extent, in a case directly in point, of holding that this power exists. On the other hand, it cannot be said with certainty that further progress in the line of the two decisions quoted would not advance the court to the position of maintaining the power to the limited extent I have suggested.

I wish to add, however, that there is no question as to the power of the general assembly to regulate the price of gas either directly or by a delegation of the power to the city council.

Respectfully submitted,

CHARLES M. WALKER,
Corporation Counsel.

PEOPLE EX REL. DENEEN

vs.

PEOPLE'S GAS LIGHT AND COKE COMPANY.

(Sup. Ct. of Ill. Oct. 6, 1903; 205 Ill. 482, 486.)

Mr. Justice WILKIN delivered the opinion of the court:

Prior to August 9, 1901, plaintiff in error presented a petition to the circuit court of Cook county for leave to file an information in the nature of *quo warranto* against defendant in error, which was on that day allowed and the information filed, but with the understanding on the part of the court and counsel for the respective parties that the respondent should have the right thereafter to ask that the order be set aside. On the 17th of the same month a motion to that effect was duly made, and after some delay the occasion of which is unimportant, submitted to Judge Haney on the petition and affidavits presented *pro* and *con*. On January 25, 1902, the motion was allowed and the order of August 9 vacated, leave to file the information denied and the petition dismissed. To reverse that ruling this writ of error is prosecuted.

Counsel agreed that leave to file an information in *quo warranto* rests in the sound discretion of the court, and it is admitted by plaintiff in error that this case is to be considered as though the petition had originally been presented to Judge Haney at the time he denied the leave to file the information. It was proper practice, upon the presentation of the petition and the appearance of the respondent, to hear affidavits and counter-affidavits as to the facts relied upon for the leave asked, and unless we can say the court below, upon a consideration of the case so presented, abused its legal discretion, the judgment must be affirmed.

The petition shows that the respondent obtained a franchise from the State of Illinois by an act of the legislature approved February 12, 1855, amended

February 7, 1865, under which, by authority of an ordinance of the city of Chicago, it purchased real estate and erected gas works, etc., for the purpose of supplying gas to the city and its inhabitants, and was engaged in so doing in the month of August, 1897, when, contrary to law, in addition to its own franchise, it began to use and usurp, and continues to use and usurp, without any legal warrant whatsoever, certain franchises and privileges, to the prejudice of the people of the State of Illinois. It then proceeds to aver the consolidation or merger of eight other gas companies furnishing light to the inhabitants of the city of Chicago with the respondent, and concludes with the averment that it "is now using and usurping the several above named franchises and privileges, and has so used the same since and after the third day of August, 1897, in said county of Cook, and still usurps and uses the same, to the great damage and prejudice of the said People of the State of Illinois and against the peace and dignity of the same."

The affidavits filed on behalf of the respondent tended to show that the object of the proceeding was to subserve the purpose of private individuals, and in resisting the leave to file the information it relied upon the well understood rule of law that *quo warranto* will not lie for the enforcement of mere private rights, but can only be resorted to for the vindication of the public interest. The counter-affidavits, though not denying many of the facts set forth in those filed on behalf of the respondent, relied mainly upon the sworn statement of the State's attorney to the effect that after a full and careful consideration of the whole matter he reached the conclusion that the act under which the defendant had consolidated with other gas companies was unconstitutional and void, and that he instituted the proceeding influenced by no other consideration than the protection of what he understood to be the public interest. Comment upon the conduct of parties who seem to have been interested in

bringing about the filing of the petition is, in our view of the case, unnecessary, the affidavit of the public officer satisfactorily showing that he acted from a sense of official duty, uninfluenced by private interests or motives. (*People* v. *North Chicago Railway Co.*, 88 Ill. 537; *McGahan* v. *People*, 191 *id.* 493.) It is not, however, clear from the petition, when considered in the light of the statute authorizing the consolidation and merger of gas companies, that the public would in any way be benefited by the judgment of ouster here sought, and it seems that the order of the court below, denying leave to file the information and dismissing the petition, was largely upon that ground. Inasmuch, however, as the petition is based solely upon the theory that the statute "in relation to gas companies," approved June 5, 1897, is unconstitutional and void, in view of our conclusion upon that subject it will be unnecessary to consider other questions raised in the argument. The position of counsel for defendant in error that *quo warranto* cannot be resorted to for the purpose of determining whether a law is constitutional is not tenable. Section 1 of Chapter 112 of our Statutes (3 Starr & Cur. Stat., p. 3180,) authorizes the bringing of the action in cases of this kind.

The statute is entitled "An act in relation to gas companies" (Hurd's Stat. 1901, p. 495). Section 1 authorizes gas companies organized in this State "to sell, transfer and convey or lease their real and personal property, rights, franchises and privileges, in whole or in part, to any other gas company doing business in the same city, town or village, and such other gas company is authorized to purchase or lease and to hold and enjoy said property." The second section (the one under which the respondent is charged with usurping the franchises of other companies) is as follows: "It shall be lawful for any gas companies now organized or hereafter to be organized in this State, doing business in the same city, town or village, to consolidate and merge into

a single corporation, which shall be one of said merging and consolidating corporations, by complying with the provisions of this act, as hereinafter specified." Section 3 authorizes all gas companies "to manufacture and distribute gas for fuel purposes and to distribute natural gas," etc. Sections 4, 5, 6, 7, 8, 9 and 10 pertain to the manner of perfecting the sale or consolidation of companies, and the effect thereof. Section 11 is: "Any corporation purchasing or leasing the property of any company or companies, or into which any company or companies are consolidated and merged under this act, shall be, at the time of availing itself of or accepting the benefits of this act, in the actual business of furnishing gas to consumers; and shall be subject to the following provisions: Such corporation shall not increase the price charged by it for gas of the quality furnished to consumers during any part of the year immediately preceding such purchase or lease, or such consolidation and merger. Such corporation shall furnish gas to consumers as good in quality as it furnished previous to such purchase or lease, or such consolidation and merger." Section 12 provides for the infliction of penalties for the violation of the preceding section, and the recovery of damages by any person injured thereby, etc.

The contention of counsel for plaintiff in error against the validity of the law is, first, it contravenes section 13 of article 4 of the constitution of 1870, and it is said: "The title of this act is 'An act in relation to gas companies.' The whole body of the act relates to the consolidation of gas companies and the sale or lease by one of its property and franchises to another. The subject of 'consolidation,' which freights most of its provisions, is not expressed in the title. The absence of such reference is fatal to the act." If by the expression "which freights most of its provisions," it is meant that the subject of consolidation is the principal object of the statute, the assertion is unwarranted by its language

and provisions. The enactment in the first section, not questioned in the argument, is no less fully provided for in the subsequent provisions of the act than is the "consolidation and merger" authorized by the second. The contention is, that authority for any gas companies now organized or hereafter to be organized in this State, doing business in the same city, town or village, to consolidate and merge into a single corporation, which shall be one of said merging and consolidating corporations, is not consistent with or germane to the general subject "in relation to gas companies."

The validity of statutes under the foregoing section of the present constitution, and a similar one as to special or local statutes in that of 1848, has frequently been before us, and we have uniformly held that "the general purpose of the provision is accomplished when the title is comprehensive enough to reasonably include as falling within that general subject, and as subordinate branches thereof, the several objects which the statute assumes to effect;" (*Potwin* v. *Johnson*, 108 Ill. 70;) that "the fact that many things of a diverse nature are authorized or required to be done is unimportant, provided the doing of them may fairly be regarded as in furtherance of the general subject of the enactment;" (*Blake* v. *People*, 109 Ill. 504;) and that "the generality of the subject embraced in the title is no objection to it, since it is purely a matter of legislative discretion whether the subject expressed shall be general or specific; and it is clear that the broader and more general the subject the greater the number of particular or subordinate subjects which will be embraced within it." (*People* v. *Nelson*, 133 Ill. 565.) "If all the provisions of the act relate to one subject, which is indicated in its title, and the parts of the act are incident to and reasonably connected with the subject indicated and are reasonably auxiliary thereto, then the act may include details of legislation with reference to that subject matter so indicated without the title being a mere

index of everything contained therein. The provision of the constitution cannot be so narrowly construed as to require the title to an act, of itself, to contain the entire act;" (*Park* v. *Modern Woodmen of America*, 181 Ill. 214;) or, stated in other language: "It is not to be expected, neither is it possible, for the title of the act to contain all the various provisions of the act itself. . . . If such was the case, the title to the act would have to be as comprehensive as the act itself. Such was not the object or intent of the constitution." (*Burke* v. *Monroe County*, 77 Ill. 610.) "Judge Cooley, in his work on Constitutional Limitations, (172,) dealing with this subject, says: 'The general purpose of these provisions is accomplished when a law has but one general object, which is fairly indicated by its title. To require every end and means necessary or convenient for the accomplishment of this general object to be provided for by a separate act relating to that alone, would not only be unreasonable, but would actually render legislation impossible.'" (*Arms* v. *Ayer*, 192 Ill. 601.) We again said in *Allardt* v. *People*, 197 Ill. 501: "The framers of the constitution intended by it to prevent legislation which should not by the title clearly inform the legislature of its purpose and prevent the people from being misled thereby. 'The generality of a title is therefore no objection to it, so long as it is not made a cover to legislation incongruous in itself, and which by no fair intendment can be considered as having a necessary or proper connection,'" citing Cooley on Const. Lim., sec. 169, *et seq.*, and *People* v. *Institution of Protestant Deaconesses*, 71 Ill. 229.

The many cases referred to as supporting the contention of plaintiff in error, most of which are found in our own Reports, all recognize and enforce the same construction announced in the foregoing decisions. Those of them which hold statutes unconstitutional for a failure to conform to section 13, *supra*, of the constitution, do so because

the enactments were incongruous, not germane to the subject expressed in the title, or that the title furnished no information to the members of the legislature or the public of their purpose. *New York and Staten Island Bridge Co.* v. *Smith*, 148 N. Y. 540, is cited in the brief of counsel for plaintiff in error in support of the foregoing objection, with the comment "squarely in point." This must have been by inadvertence. The case has no bearing whatever upon the question involved. It neither deals with nor discusses it. The only constitutional question there decided was, that parts of a statute conceded to be unconstitutional did not invalidate the whole act.

We have been unable to find any authority for the position that the consolidation and merger of gas companies authorized by section 2 are in any way inconsistent with or foreign to the title of the foregoing statute relating to gas companies, nor are we able to perceive any good reason for such a conclusion. There can be no doubt that in the absence of constitutional limitation the legislature has full power to authorize the consolidation of all private corporations organized under the laws of the State. (1 Beach on Private Corp. sec. 332.) The only restriction in our constitution upon that power is the provision found in section 11 of article 11, which prohibits railroad corporations from consolidating with any other railroad corporation owning a parallel or competing line. Many of the State constitutions contain provisions similar to section 11, *supra*, of our own, and some States have by their constitutions prohibited all combinations of corporations to prevent competition, (6 Am. & Eng. Ency. of Law,—2d ed.—p. 825,) but, as above stated, our constitution contains no such prohibition.

"The legislative power may be exercised by grant in the charters of consolidating companies, or by the provisions of a general or special act of the legislature passed prior to consolidation and after the organization of the original corporations." (1 Beach

on Private Corp. sec. 334.) In section 326 of the same work the following definition of consolidation is given: "The word 'consolidation' is used to denote any conjunction or union of the stock, property or franchises of two or more corporations, whereby the conduct of their affairs is permanently or for a long period of time placed under one management, whether the agreement between them be by lease, sale or other form of contract, and whether its effect be the dissolution of neither of the companies, or whether one of them be dissolved and its existence be merged in the corporate being of the other, or whether it result in the dissolution of both companies and the creation of a new corporation out of such portions of the original companies as enter into the new." Statutes "authorizing the consolidation of 'manufacturing' corporations have been held to include electric light companies, and also, undoubtedly, include gas companies." "Acts of several of the States also authorize the consolidation of corporations of the same nature and covering the same territory. Such an act has been held to include gas companies and water companies, organized to furnish water for the same village." (6 Am. & Eng. Ency. of Law, p. 803, and cases cited.)

The frequency with which corporations are consolidated, by sale, lease or other form of contract, and the fact that many of the States have adopted general statutes authorizing the consolidation and merger of corporations, repel the idea that such consolidation and merger are foreign to the general subject "in relation to corporations" and not reasonably included therein, or, when applied to this act, the subject "consolidation and merger" is not germane to the title "in relation to gas companies." We entertain no doubt that the enactment authorizing the consolidation of gas companies is, under the repeated decisions of this court, embraced in the title of this act, within the meaning of section 13 of article 4 of the constitution of 1870.

The second ground upon which the act is condemned is, that it violates section 22 of article 4, which prohibits the passage by the General Assembly of any local or special laws "granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever." Soon after the adoption of the present constitution, in passing upon the validity of a provision in the act in force July 1, 1872, known as the "mayors' bill," we said: "The act is neither local nor special. It applies in general terms to all the cities in the State. Whether there may be many or few to whom its provisions will be of any practical force is not the question. As was observed in *McAunich* v. *M. & M. R. R. Co.* 20 Iowa, 338: 'These laws are general and uniform, not because they operate upon every person in the State, for they do not, but because every person who is brought within the relations and circumstances provided for is affected by the laws. They are general and uniform in their operation upon all persons in the like situation, and the fact of their being general and uniform is not affected by the number of those within the scope of their operation.'" (*People* v. *Wright*, 70 Ill. 388.) To the same effect is *Potwin* v. *Johnson*, *supra*. In *Hawthorn* v. *People*, 109 Ill. 302, the validity of the act of June 18, 1883, in relation to butter and cheese factories, was challenged, for the reason, among others, that it was special or class legislation, but we again said (p. 311): "We fail to perceive that this is not a general law. It embraces all persons in the State similarly engaged. If all laws were held unconstitutional because they did not embrace all persons, few would stand the test. . . . A law is general, not because it embraces all of the governed, but that it may, from its terms, when many are embraced in its provisions, and all others may be when they occupy the position of those who are embraced." (See, also, *People* v. *Hazelwood*, 116 Ill. 319; *Cummings* v. *City of*

Chicago, 144 *id.* 563; *Park* v. *Modern Woodmen of America, supra.*) The act under consideration applies to all gas companies organized or to be organized in this State, doing business in the same city, etc., and is therefore in no proper sense special or local legislation.

Again, it is said the respondent, "as a result of the act in question, would acquire to itself the franchise of eight other corporations organized under general laws. The company's charter would thus be extended or amended so as to confer upon said company the right to merge with other gas companies or the right of having them merged into itself, and this not by general law relating to all corporations, but by this special law relating only to gas companies. This distinctly contravenes section 1 of article 11, that 'no corporation shall be created by special laws, or its charter extended, changed or amended, . . . but the General Assembly shall provide, by general laws, for the organization of all corporations hereafter to be created.'" The entire argument in support of this proposition rests upon the assertion that "as a result of this act the respondent would acquire to itself the franchise of eight other corporations organized under general law." If the proposition was otherwise sound, it cannot be sustained under the facts of this case. The petition fails to show in what way or manner the respondent is exercising any of the rights or privileges, granted to either of the other companies, or that it is using other rights and privileges than those authorized by its own charter. Although the general rule is that the consolidation of several corporations into a new one invests the latter with all the rights and privileges of the several constituent companies, such is not the result of consolidation or merger under this statute. Section 2 expressly provides that the consolidation and merger into a single corporation must be into one of the merging and consolidating corporations, which by section 11, shall be, at the

time of availing itself of or accepting the benefits of the act, in the actual business of furnishing gas to consumers. By the last clause of section 8 it is provided: "The companies, parties to the agreement or agreements, which provide for consolidation and merger, shall thereupon be and are hereby declared to be consolidated and merged into the one corporation specified in such agreement or agreements." While section 9 makes the consolidated corporation subject to, and requires it to perform for each of the companies so entering into said agreement or agreements, the legal obligations resting upon each of them, respectively, under their respective charters and ordinances, in the same manner and to the same extent as if the companies had remained individual and distinct, it does not confer upon it any enlarged powers or privileges. Moreover, there is nothing whatever in the petition to show that the rights, privileges and franchises of any or either of the consolidated or merged companies are larger or in any way different from those of the respondent.

We are of the opinion that none of the objections urged to the constitutionality of the statute can be sustained. It is scarcely necessary in this case to call attention to or place reliance upon the well understood rule that every presumption must be indulged in favor of the validity of enactments by the legislative branch of the government, and that statutes will only be held unconstitutional and void after resolving every reasonable doubt in favor of their validity. It is said: "If this act is sustained, its necessary and only possible operation will be to promote and create a monopoly. The attempted consolidation under it has resulted in a gas trust." If a monopoly has been created or a gas trust formed by the consolidation of the defendant in error with the other corporations named in the petition, it does not so appear in this proceeding; nor are we able to see how such a result can follow in view of the requirements

of section 11 of the act and the penalties imposed by section 12. Whether the city council of the City of Chicago has power to regulate the price which the respondent company may charge for gas furnished to it and its inhabitants or not, there is nothing in this case to show that extortion is being practiced or a monopoly created by it. It will be time enough to meet those questions when a case is presented involving them.

There was no abuse of legal discretion in denying the leave to file the information and dismissing the petition. The judgment of the circuit court will accordingly be affirmed.

Judgment affirmed.

Mr. Justice Magruder, dissenting.